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EDITOR'S NOTE

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o. 85-303-CSY
tatus: GRANTED

Title: Missouri, Petitioner
v.
Zola Blair

ocketed:
ugust 22, 1985

Court: Supreme Court of Missouri

Counsel for petitioner: Frager, Robert, Riederer, Albert A.

Counsel for respondent: Locascio, Joseph H.

try	Date	Note	Proceedings and Orders
1	Aug 22 1985	G	Petition for writ of certiorari filed.
2	Sep 25 1985		DISTRIBUTED. October 11, 1985
4	Oct 10 1985	P	Response requested. (Due November 9, 1985 - NONE RECEIVED)
5	Nov 6 1985		Brief of respondent Zola Blair in opposition filed.
6	Nov 6 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Nov 20 1985		REDISTRIBUTED. December 6, 1985
9	Dec 10 1985		REDISTRIBUTED. December 13, 1985
1	Dec 16 1985		REDISTRIBUTED. January 10, 1986
2	Jan 13 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED.
3	Jan 13 1986		Petition GRANTED.
			**********
4	Feb 7 1986		Record filed.
6	Feb 18 1986		Order extending time to file brief of petitioner on the merits until March 21, 1986.
7	Mar 18 1986		Order further extending time to file brief of petitioner on the merits until March 28, 1986.
8	Mar 28 1986		Joint appendix filed.
9	Mar 28 1986		Brief of petitioner Missouri filed.
0	Apr 24 1986		Brief amicus curiae of ACLU, et al. filed.
2	May 1 1986		Order extending time to file brief of respondent on the merits until May 28, 1986.
5	Jun 10 1986		Brief of respondent Zola Blair filed.
6	Jul 25 1986		CIRCULATED.
7	Sep 3 1986		SET FOR ARGUMENT. Wednesday, November 12, 1986. (3rd case) (1 hour)
8	Nov 4 1986	X	Reply brief of petitioner Missouri filed.
0	Nov 12 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-303

No.

In the Supreme Court of the United States

October Term, 1985

STATE OF MISSOURI,
Petitioner,

VS.

ZOLA BLAIR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT EN BANC

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Do the cases of *Davis v. Mississippi*, 394 U.S. 721 (1969) and *Hayes v. Florida*, ... U.S. ....., 105 S.Ct. 1643 (1985) support a finding that upon suspicion by a police department that an individual might have committed a felony, but suspicion less than probable cause necessary for the issuance of a warrant on the felony charge, the arrest of the individual upon a valid municipal warrant with the ulterior motive to obtain fingerprints of the suspect upon the felony is constitutionally prohibited under the Fourth Amendment of the United States Constitution?

Does the fact that a police department has an ulterior motive in making an arrest on a valid municipal warrant make the arrest pretextual so as to invalidate the arrest, the fingerprinting of the arrestee and a confession to a felony subsequently made by the arrestee-suspect as a matter of law?

Does a confession to a felony crime become invalid as matter of law if it is made subsequent to an arrest upon a valid municipal warrant if the police authorities had an ulterior motive in making such arrest at that particular time?

Can a police authority in good faith rely upon the validity of a municipal arrest warrant to effectuate an arrest of an individual when they serve the warrant with an ulterior motive to collect evidence of a felony charge?

Should an otherwise voluntary confession be suppressed when the suspect previously had been arrested on a felony arrest warrant which was the result of having her fingerprints taken without probable cause in light of the *Nix v. Williams*, 468 U.S. ....., 104 S.Ct. 2501 (1984) described "Inevitable Discovery" Doctrine?

PARTIES TO THE PROCEEDING

The petitioner herein is the State of Missouri acting and represented by Albert L. Riederer, Prosecuting Attorney in and for Jackson County, Missouri.

Respondent is Zola Blair represented by Joseph Locascio, Special Public Defender, Jackson County, Missouri.

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No.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On June 25, 1985, the Supreme Court of Missouri denied petitioner's request for a rehearing of its en banc decision as found as Appendix A(1). The opinion of the Missouri Supreme Court en banc in the case styled *State of Missouri*, Plaintiff-Appellant vs. *Zola Blair*, Defendant-Respondent, Case No. 66352, which case with dissenting opinion is not yet reported, was entered on May 29, 1985 and may be found as Appendix A(1).

The Supreme Court of Missouri transferred the cause after decision of and from the Missouri Court of Appeals, Western District, which decision also was not reported and which may be found as Appendix A(2).

JURISDICTIONAL STATEMENT

This petition seeks review of the decision of the Supreme Court of Missouri en banc entered May 29, 1985 (App. A(1)). On June 25, 1985, that court denied petitioner's application for rehearing en banc (App. C). This petition has been filed within sixty (60) days after the rendering of the final judgment in this case. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3) (1982).

CONSTITUTIONAL PROVISIONS INVOLVED

The issues before the trial and appellate courts below involved the courts' sustaining a motion to suppress warrant, fingerprints and confession based upon the alleged violation of the Fourth and Fifth Amendments to the United States Constitution. These provisions are set forth below:

United States Constitution Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

> in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This petition challenges the decision of the Supreme Court of Missouri which sustained the suppression of an arrest of Zola Blair, fingerprints taken from her while then in custody, a felony warrant issued for her arrest and her subsequent confession of involvement in a murder.

This case began as a result of the police authorities in Kansas City, Missouri discovering a murder on November 24, 1981 with the only evidence being found on the scene being a palm print. On January 22, 1982, an informer implicated Zola Blair and her family in the murder. Comparison of the palm prints of other family members with the print found at the scene of the crime failed to produce a match and Ms. Blair's print was not in the police files. On January 23 Detective Lauffer requested that she be picked up for homicide but did not ask for a homicide arrest or search warrant because he believed there was not enough evidence to support a warrant. The police then learned that she was the subject of an outstanding city warrant for a traffic violation. On February 5, 1982, police arrested defendant at her home, advised her of Miranda rights, took her to the homicide unit, booked her on a charge of homicide, and took her

palm and fingerprints. Later that day, she was questioned about the homicide. After the interrogation, the officer requested that her palm print be compared with that taken from the crime scene. She was detained for homicide overnight and released at 10:45 a.m. the next day. Fourteen minutes later she was booked on the municipal court parking warrant. At 12:55 p.m., she posted bond on the traffic violation and was released.

On February 8, 1982, upon learning that defendant's print matched the print found at the scene of the crime, police sought and received an arrest warrant on the homicide charge. She was arrested at 5:30 p.m. on that day and booked shortly thereafter. During an interrogation that began at 6:15 p.m. and after again being advised of her Miranda rights, officers confronted her with evidence of the matching prints and obtained inculpatory statements.

Upon the above evidence, which was given as part of a suppression motion filed by Respondent herein, the trial court sustained said motion, from which order the State of Missouri filed a direct Appeal from said suppression order to the Missouri Court of Appeals for the Western District of Missouri, which court on July 3, 1984 entered its opinion and judgment affirming the suppression order of the trial court. The Supreme Court of Missouri granted transfer of the case to examine the effect of decisions of this Court decided subsequent to the Court of Appeal's decision.

On May 29, 1985, the Supreme Court of Missouri entered its judgment affirming the suppression of the arrest, the taking of the fingerprints and confession and on June 25, 1985, denied a timely filed Application for Rehearing.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for certiorari for the following reasons. First, the Supreme Court of Missouri misconstrued and misapplied this Court's decisions construing and interpreting the Fourth Amendment to the United States Constitution, more specifically, the cases of *Davis v. Mississippi*, 394 U.S. 721 (1969) and *Hayes v. Florida*, ... U.S. ....., 105 S.Ct. 1643 (1985) by finding that an arrest upon a valid but minor municipal warrant is unconstitutional under the Fourth Amendment to the United States Constitution when the police authorities had suspicion less than probable cause that Respondent had been involved in a felony crime of murder and when the arrest was effected for the purpose of obtaining evidence regarding the suspected felony crime.

Second, that the Supreme Court of Missouri misconstrued and misapplied this Court's decisions of *United States v. Robinson*, 414 U.S. 218 (1973) and *Gustafson v. Florida*, 414 U.S. 260 (1973), which cases held that valid custodial arrests leading to searches and seizures rested upon the right of the police authorities to arrest the individual in the first place, in this case, the valid municipal warrant of arrest.

Third, that the Supreme Court of Missouri erroneously applied a per se rule in the suppression of a confession made by Respondent herein upon the "fruit of the poisonous tree" principle established by the case of *Wong Sun v. United States*, 371 U.S. 471 (1963), but subsequently restricted by this Court in the cases of *United States v. Crews*, 445 U.S. 463 (1980), *Brown v. Illinois*, 422 U.S. 590 (1975) and most recently by the decisions in *Nix v. Williams*, 468 U.S. ....., 104 S.Ct. 2501 (1984) and *Oregon v. Elstad*, ... U.S. ....., 105 S.Ct. 1285 (1985).

Fourth, that the Supreme Court of Missouri misconstrued and misapplied this Court's decisions of *United States v. Leon,* 469 U.S. ....., 104 S.Ct. 3405 (1984) and *Massachusetts v. Sheppard,* 469 U.S. ....., 104 S.Ct. 3424 (1984), in which cases the prosecution was allowed to use in its case-in-chief evidence obtained by officers acting in reasonable reliance and in good faith on a search warrant which warrant was later invalidated.

Fifth, that the Supreme Court of Missouri misconstrued and misapplied this Court's decision of *Nix v. Williams,* 468 U.S. ....., 104 S.Ct. 2501 (1984) and the inevitable discovery rule therein set forth and applied.

I.

THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE IMPROPER INTERPRETATION BY THE SUPREME COURT OF MISSOURI OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION REGARDING THE INVALIDATION OF AN ARREST UPON A LEGAL BUT MINOR WARRANT WHEREIN THE POLICE AUTHORITIES HAVE SUSPICION THAT THE NAMED ARRESTEE WAS INVOLVED IN A FELONY CRIME NOTWITHSTANDING THE FACT THE PURPOSE OF THE ARREST IS TO FURTHER THE FELONY CRIME INVESTIGATION.

This petition comes to this Court with a clear, direct and incontrovertible misconstruction of this Court's holding in the cases of *Davis v. Mississippi,* 394 U.S. 721 (1969) and most recently in the case of *Hayes v. Florida,* ..... U.S. ....., 105 S.Ct. 1643 (1985). This court in both cases held that a person could not be taken into custody without warrant or probable cause for the purpose of fingerprinting.

However in each case this Court positively and specifically stated that the failures of the authorities therein were the lack of probable cause or their failure to obtain or have a *warrant,* which in this case did in fact exist. The fact that the warrant was concerning an otherwise minor municipal offense is legally irrelevant. The opinion relying upon the *Davis* and *Hayes* cases, supra, did so improperly.

This Court has specifically decided that the authority of an arresting officer to make a custodial arrest depends upon the right of the police officer to initially arrest the individual in question. *United States v. Robinson,* 414 U.S. 218 (1973) and *Gustafson v. Florida,* 414 U.S. 260 (1973). *Robinson,* supra, involved a lawful arrest of an individual for a minor traffic offense which led to the individual being searched without a warrant and which resulted in the finding of narcotics. This court therein stated:

> "A custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." 414 U.S. at 235.

In *Gustafson,* supra, a search of a driver occurred after an arrest for not having a driver's license on his person, the court stated at 414 U.S. at 263-264:

> ". . . it is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful

custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."

In *Robinson*, supra, this court stated that:

". . . our more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. We do not think the long line of authorities of this Court dating back to Weeks, or what we can glean from the history of practice in this country and in England, requires such case-by-case adjudication. A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. The authority to search the person incident to a lawful custodial arrest, . . ., does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth

Amendment, but is also a 'reasonable' search under that Amendment." 414 U.S. at 235.

In the case of *New York v. Belton*, 453 U.S. 454 (1981), this Court adopted and confirmed the view that police officers have the authority to search upon lawful arrest.

The search and/or seizure could even constitutionally occur many hours after the arrest. See *United States v. Edwards*, 415 U.S. 800 (1974) wherein this court approved the seizure of an arrestee's clothing some ten hours after his arrest and having been in constant custody of the police.

The power and authority of the police officer to constitutionally make custodial arrest for even minor traffic violations has never been restricted. *United States v. Robinson*, supra; *Gustafson v. Florida*, supra; *Robbins v. California*, 453 U.S. 420 (1981).

Once the individual is in lawful custody of the police, he or she then becomes subject to fingerprinting as part of the routine identification procedure. *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963). This principle is also accepted law in Missouri. *State v. Hunter*, 655 S.W.2d 682 (Mo. App. 1982).

Counsel suggests that any ulterior motive had by the authorities which had the legal and constitutional right of arrest is legally irrelevant and does not become pretextual within the restricted definition of *Davis v. Mississippi*, supra and *Hayes v. Florida*, supra, and constitutionally defective. However this is exactly what the decision below does and its effect upon ALL arrests based upon warrants and probable cause. This would create a preposterous situation of all arrest warrants becoming vulnerable to legal attack simply because the suspect might be a major criminal and the suspect in many and multiple crimes. The procedural havoc caused by such an interpretation is incalculable.

These issues are substantial and without review by this Court, they remain in direct conflict with the decisions of this Court construing the Fourth Amendment to the United States Constitution.

II.

THE SUPREME COURT OF MISSOURI RELIED UPON OTHER DECISIONS OF THIS COURT WHICH IT MISCONSTRUED AND MISINTERPRETED AND DECIDED THE ISSUES IN THIS DIRECTLY CONTRARY TO THE DECISIONS OF THIS COURT.

The opinion of the Supreme Court of Missouri is in direct conflict interpretation of this Court regarding the Self Incrimination Clause of the Fifth Amendment when it is simply stated and found as follows:

> "Because the illegally seized evidence provided the sole basis for the arrest warrant for homicide of February 8, 1982, and led directly to respondent's statements on that day, the warrant and statement are also inadmissible as 'fruits of the poisonous tree'. *Wong Sun v. United States,* 371 U.S. 471 (1963)." App. A(1).

To this very brief statement of an issue raised by the State of Missouri below, the court below citing *Wong Sun,* supra, resolved the arguments of the State against it, which argument was that, notwithstanding any illegality of the original arrest and fingerprinting procedures, the Fourth Amendment suppression of a subsequent confession is not and should not be a per se result. The court ignored the statement of the State of Missouri that the per se "fruit of the poisonous tree" principle espoused by *Wong Sun,* supra, has many times been discredited by this Court, most recently in the cases of *Nix v. Williams,* 468

U.S. ....., 104 S.Ct. 2501 (1984) and *Oregon v. Elstad,* ..... U.S. ....., 105 S.Ct. 1285 (1985).

The correct statement of the law is that a confession obtained through custodial interrogation after an illegal arrest should be excluded UNLESS intervening events break the causal connection between the illegal arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. *Taylor v. Alabama,* 457 U.S. 687, 690 (1982); *Brown v. Illinois,* 422 U.S. 590, 602 (1975); *Nix v. Williams,* supra; *Oregon v. Elstad,* supra.

This Court has stated that the *Miranda* warnings, here given twice before respondent confessed, can preserve the admissibility of incriminating statements given by an accused against the argument that they are inherently tainted. The trier of facts must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. *Oregon v. Elstad,* supra.

Although the *Miranda* warnings, by themselves and standing alone, do not automatically remove the taint of an unlawful arrest or even an illegal search, this Court stated that the trial court must consider factors which include the temporal proximity of the arrest and the confession, whether or not the warnings were given, the purpose and flagrancy of official misconduct, whether the confession was obtained by incommunicado interrogation in a coercive environment, the duration of the questioning, whether or not the accused was allowed to communicate with the outside world, the attitude of the police toward the suspect, his or her mental state, age, intelligence, educational level and whether he or she was subjected to physical abuse.

The issue of whether the confession was voluntary was not considered by the trial court or mandated by

the state appellate courts in direct contravention to the directives of this Court.

The Supreme Court of Missouri also misinterpreted the applicability of the "good faith" exception to the exclusionary rule recognized in the case of *United States v. Leon*, 469 U.S. ....., 104 S.Ct. 3405 (1984) and *Massachusetts v. Sheppard*, 469 U.S. ....., 104 S.Ct. 3424 (1984) by stating that the police authorities acted in "bad faith" in arresting the respondent on a valid warrant.

Under the authority of a valid warrant (*United States v. Robinson*, 414 U.S. 218 (1973), *Gustafson v. Florida*, 414 U.S. 260 (1973) and *Robbins v. California*, 453 U.S. 420 (1981)), respondent was taken into custody and upon being taken into legal custody, she was advised of her *Miranda* rights and fingerprinted (*Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963)). Subsequently after the issuance of a valid arrest warrant which was some three days after the original arrest and two days after her release from custody, and again after being given her *Miranda* rights, she confessed her participation to the crime.

It is rather bizarre for the Supreme Court of Missouri to find that under these facts, the actions by the police authorities constituted "bad faith without a search warrant" as a matter of law. It should not be left to the judgment of individual police officer to determine whether any warrant for the arrest of a suspect is valid or legally deficient and to then determine which warrant to serve and which one to ignore. This is not the constitutional mandate of this Court.

The court below further misinterpreted the applicability of the "inevitable discovery" doctrine of *Nix v. Williams*, supra, in that, without analysis or discussion whatsoever, it concluded that the State of Missouri had failed to establish that the evidence uncovered by the arrest, to-wit: the fingerprints would not have been brought to light by lawful means. This conclusory and simple statement ignores the fact that the police did in fact have a warrant for respondent's arrest. It was inevitable that she would have been arrested and taken into custody at some time at which time her fingerprints could have then been taken by the police.

It is somewhat absurd that under the circumstances, the police must sit on their hands and wait until, in the regular course of events, respondent was served with the arrest warrant, but in the meantime, stop their investigation of a homicide.

CONCLUSION

The issues herein presented are important constitutional issues leaving the State of Missouri in direct conflict with the many judgements and opinions of this Court regarding the interpretation of the Fourth and Fifth Amendments to the United States Constitution. The decision simply cannot be reconciled with the decisions of this Court. The state court should be allowed to ignore the Fourth and Fifth Amendment holdings of this Court and leave the state with a different constitutional standard of law than the rest of the country. This is the effect of the decision.

For these reasons, this Court should grant certiorari.

Respectfully Submitted,

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APPENDIX

APPENDIX A(1)

(Filed May 29, 1985)

SUPREME COURT OF MISSOURI
en banc

No. 66352

STATE OF MISSOURI,
Plaintiff-Appellant,

vs.

ZOLA BLAIR,
Defendant-Respondent.

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY
Honorable H. Michael Coburn, Judge

Zola Blair, charged with murder, moved to suppress certain evidence, including her palm prints and statements made to the police, and to quash an arrest warrant. The trial court, after evidentiary hearing, sustained her motion. The State of Missouri filed an interlocutory appeal from the order of suppression pursuant to section 547.200, RSMo; the Court of Appeals, Western District, affirmed. This Court granted transfer to examine the effect, if any, of United States Supreme Court cases decided subsequent to the Western District decision. The question is whether, in the circumstances of this case, defendant's initial arrest was pretextual and rendered her

subsequent detention unlawful and evidence obtained incident thereto inadmissible. This Court draws freely from the opinion written by the Honorable Jack P. Pritchard for the court of appeals and reaches the same result.

This case involves three well-known principles of law:

First and foremost is the constitutional protection of citizens from unreasonable searches and seizures by requiring the authorities to secure a search warrant based on probable cause "describing the place to be searched, or the person or thing to be seized. . . ." Mo. Const. art. I, § 15; U.S. Const., amend. IV. "[A]ll warrantless searches, subject only to a few well delineated exceptions, are per se constitutionally offensive." State v. Peterson, 525 S.W.2d 599, 603 (Mo. App. 1975).

Second is the case law-supported rule that upon review of a trial court's order, the facts, and reasonable inferences arising therefrom, are to be stated favorably to the order challenged on appeal. *See* State v. Giffin, 640 S.W.2d 128, 130 (Mo. 1982).

Third is the case law-supported rule that the reviewing court is free to disregard contrary evidence and inferences, and is to affirm the trial court's ruling on a motion to suppress if the evidence is sufficient to sustain its finding. *Giffin, supra;* State v. Baskerville, 616 S.W.2d 839, 843 (Mo. 1981); State v. Rainbolt, 676 S.W.2d 527, 528 (Mo. App. 1984).

Police discovered a murder on November 24, 1981; the only evidence found was a palm print. On January 22, 1982, an informer implicated Zola Blair and her family in the murder. Comparison of the palm prints of other family members with the print found at the scene of the crime failed to produce a match; defendant's print was

not in the police file. On January 23, Detective Lauffer requested that defendant be picked up for homicide but did not ask for a homicide arrest or search warrant because he believed there was not enough evidence to support a warrant. The police then learned that she was the subject of an outstanding city warrant for a traffic violation. On February 5, 1982, police arrested defendant at her home, took her to the homicide unit, booked her on a charge of homicide, and took her palm and finger prints. Later that day, she was questioned about the homicide. After the interrogation, the officer requested that her palm print be compared with that taken from the crime scene. She was detained for homicide overnight and released at 10:45 a.m. the next day. Fourteen minutes later she was booked on the municipal court parking warrant. At 12:55 p.m., she posted bond on the traffic violation and was released.

On February 8, 1982, upon learning that defendant's print matched the print found at the scene of the crime, police sought and received an arrest warrant on the homicide. She was arrested at 5:30 p.m. on that day and booked shortly thereafter. During an interrogation that began at 6:15 p.m., officers confronted her with evidence of the matching prints and obtained inculpatory statements.

For reversal the State contends that once a legal basis for an arrest exists—in this case the outstanding traffic warrant—the subjective motives of the police become irrelevant; therefore, defendant was in lawful custody pursuant to the parking violation warrant when fingerprinted, and the prints obtained then, as well as the statements that followed, are admissible. Respondent argues that the trial court correctly found that she was not in lawful custody because the arrest was but a pretext for

a search; and that the palm print and statements obtained on February 5, 1982, are inadmissible as products of an illegal detention, and the February 8th statements are also inadmissible as the "fruit" of the illegally seized palm print. Appellant counters that even if "seizure" of the palm print was illegal, this does not render the later statement inadmissible.

The United States Supreme Court recently reaffirmed its holding in Davis v. Mississippi, 394 U.S. 721 (1969), that the exclusionary rule, barring admission of all evidence obtained by searches and seizures in violation of the warrant requirement, applies to investigatory detentions in general and to fingerprint evidence in particular. Hayes v. Florida, 53 U.S.L.W. 4382 (U.S. 1985). In *Hayes*, police found latent finger-prints on the doorknob of the bedroom of one of the victims of a series of burglary-rapes. Police interviewed Hayes along with other men whose general descriptions matched that of the assailant. Acting on suspicion and without a warrant, investigators went to Hayes' home with the intent to obtain his fingerprints or arrest him if necessary. *Id.* at 4382. Under threat of arrest, Hayes accompanied the officers to the station house, where he was fingerprinted. Police formally arrested Hayes after they learned that his prints matched those left at the scene of the crime. The trial court denied Hayes' motion to suppress the fingerprint evidence and he was convicted of burglary and sexual battery. The United States Supreme Court reversed the judgment, noting that "[h]ere, as in *Davis*, there was no probable cause to arrest, no consent to the journey to the police station, and no judicial authorization for such a detention for fingerprinting purposes." *Id.* at 4383. The Court held that police investigative activity triggers the "full protection" of the fourth amendment "when the police without probable

cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes." *Id.*

In this case it is undisputed that the police lacked probable cause to arrest defendant on the homicide charge; to establish the legality of the warrantless search and seizure here then the State must show that one of the exceptions to the warrant requirement applies.

Appellant seeks to bring the challenged fingerprinting within the search incident to a lawful arrest exception to the warrant requirement. A valid custodial arrest of a suspect authorizes, without more, a search incident to the arrest. United States v. Robinson, 414 U.S. 218 (1973); State v. Moody, 443 S.W.2d 802 (Mo. 1969). It is also true that a suspect in lawful custody is subject to fingerprinting as part of routine identification procedure. Smith v. United States, 342 F.2d 879 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); State v. Hunter, 625 S.W.2d 682 (Mo. App. 1981). Prerequisites to application of the foregoing are a lawful arrest, Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961), and lawful custody, *Hunter*, 625 S.W.2d at 684 ("Although a person may not be taken into custody for the purpose of fingerprinting if the police do not have a warrant or probable cause, . . . once he is lawfully arrested, he is subject to a full search incident to the arrest.").

The evidence conflicts on whether the officers arrested defendant on the outstanding parking violation warrant. Officer Stewart testified that he "arrested her for an outstanding city warrant and also asked her to accompany [them] with regards to a pickup order issued by the crimes against persons unit." He also testified that he went to her residence to take her into custody on the homicide

pickup order and he did not have an arrest warrant. He advised defendant of her constitutional rights in compliance with *Miranda* although such warnings are not given on arrests for parking violations that do not involve criminal activity. Officer Stewart's partner, Officer Thomas, filed the report of the arrest under the homicide charge number as "investigation arrest-criminal homicide"; and the officers followed the procedure used for arresting and booking an individual on a homicide charge rather than that used for a traffic violation. Defendant was taken to the homicide unit at the police department's downtown station and booked there on a state charge for homicide, not for the parking violation at the district station on 63rd street. Under the normal procedure for booking a person on a municipal court parking violation, the police obtain one fingerprint of the person and allow the person to remain at a district station for four hours in order to post bond. In this case, the suspect was taken to the homicide unit where a complete set of defendant's palm and finger prints was taken, she underwent interrogation regarding the homicide, and was detained overnight. It was after all this that the police booked her on the parking violation.

The conflicts thus raised by the evidence were for the trial court to resolve. The trial court resolved them in favor of defendant, and this Court defers to the trial court's determination because it is supported in the evidence. Baskerville, 616 S.W.2d at 843; *Rainbolt,* 676 S.W. 2d at 528. State v. Cotterman, 544 S.W.2d 322 (Mo. App. 1976), while not involving an outstanding warrant, is pertinent. There the court rejected an attempt to rely on the search incident to the arrest exception, stating that "since there was no lawful arrest of defendant for violation of a traffic regulation it necessarily follows that there could be no search incident to a non-existent arrest." *Id.*

at 327. And in United States v. Prim, 698 F.2d 972 (9th Cir. 1983), where officers did have an outstanding nonsupport warrant for defendant's arrest, the court refused to accept the warrant as justification for a search and seizure based on suspicion that defendant was a drug trafficker. The court explained that the warrant, "[i]f anything, . . . provides a pretext after the fact to justify the officers' actions. Such pretextual use to justify an arrest or search has been clearly recognized as violative of the fourth amendment." *Id.* at 975. *See also* United States v. Millio, 588 F. Supp. 45, 48-49 (W.D.N.Y. 1984) (requiring suppression of pistol seized during detention of defendant, where scofflaw - three or more unpaid parking tickets - was used as a pretext for continuing the detention).

Assuming an arrest for the parking violation, the arrest, in the circumstances of this case, was at best a pretext employed to gather evidence on an unrelated homicide, and this Court cannot say, on this record, that the trial court erred in suppressing the evidence so seized. A well established limitation on on the search incident to a valid arrest exception is the rule that an arrest may not be used as a pretext to search for evidence. United States v. Lefkowitz, 285 U.S. 452 (1932); *Taglavore,* 291 F.2d at 265; State v. Goodman, 449 S.W.2d 656 (Mo. 1970); State v. Howell, 543 S.W.2d 836, 838 (Mo. App. 1976). *Compare Taglavore,* 291 F.2d at 265 ("[T]he *search* must be incident to the *arrest,* and not vice versa.") *with* State v. Lamaster, 652 S.W.2d 885 (Mo. App. 1983) (upholding search incident to lawful arrest even though initial arrest unlawful because no search occurred until after subsequent valid arrest on outstanding warrant). In *Moody,* the court, finding no evidence of pretext, upheld an arrest and search as lawful, stating, "If the arrest for a traffic violation is used as a *pretext* for conducting the search, the

proceeds of the search incident thereto will be inadmissible. The question of good faith on the part of arresting officers is capable of adjudication." 443 S.W.2d at 804.

The rule rendering evidence procured by means of a pretextual arrest inadmissible is oft stated. None of the cases cited by the parties or found by the Court's research, however, involves precisely the circumstances of the instant case. The State relies on United States v. Robinson, 414 U.S. 218 (1973), and Gustafson v. Florida, 414 U.S. 260 (1973), but the holdings in each of these cases rest on the assumption that the police executed a valid probable cause, full-custody arrest.

The State also cites cases from other jurisdictions for the proposition that where the police have a valid reason to arrest for a traffic violation and conduct a search reasonably related to the arrest, evidence seized is admissible regardless of the motives of the arresting officer. Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971); Urquhart v. State, 261 So. 2d 535 (Fla. App. 1972); State v. Holmes, 256 So. 2d 32 (Fla. App. 1971); Musgrove v. State, 1 Md. App. 540, 232 A.2d 272 (1967); Braxton v. State, 234 Md. 1, 197 A.2d 841 (1964); Shackelford v. State, 473 P.2d 330 (Okla. Crim. 1970). Each of the cases cited is readily distinguishable as presenting a situation where the defendant commits an offense in the presence of the officers, who then immediately arrest and search incident thereto. For example, in *Holmes*, the court held that a traffic violator is not immune from the seizure of evidence of a more serious crime "provided that the gravity of the traffic offense is such that any citizen would routinely be stopped for it if seen committing the offense by a traffic officer on routine patrol." 256 So. 2d at 34. *See*

also Urquhart, 261 So. 2d at 536 (Mann, J., concurring) ("The motive of the arresting officer does not immunize a suspected motorist from an arrest to which any of us would be subject were we seen driving as Urquhart drove."). Underlying these cases is appreciation for the far reaching consequences of allowing the common offense of a traffic violation to serve as justification for an otherwise unconstitutional search. *See* Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968).

Appellant's reliance on State v. Hunter, 625 S.W.2d 682 (Mo. App. 1981) is similarly misplaced. In *Hunter*, a federal officer, suspecting the defendant of committing forgery, consulted the local police, who arrested the defendant pursuant to outstanding municipal arrest warrants. At the police station, the federal officer questioned and fingerprinted the defendant. The trial court excluded those fingerprints because the federal officer lacked probable cause to take them at that time. The trial court, and subsequently the court of appeals, held admissible a second set of fingerprints obtained while the defendant was lawfully in custody at a later date. The language to which appellant refers, recognizing the authority of the police to fingerprint a suspect in lawful custody, relates to this second set of prints. Thus *Hunter* is dissimilar to the present case and does not aid the State's position.

The record in this case supports the ruling of the trial court. The execution of the parking violation warrant was but a subterfuge or pretext, not pursued, to gather evidence of the unrelated crime of homicide. The palm and finger prints and statements obtained on February 5, 1982, were properly suppressed because they resulted from an unlawful arrest and search. Because the illegally seized evidence provided the sole basis for the

arrest warrant for homicide of February 8, 1982, and led directly to respondent's statements on that day, the warrant and statement are also inadmissible as "fruits of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963). *See* State v. Hoven, 269 N.W.2d 849, 854 (Minn. 1978); State v. Mayes, 654 S.W.2d 926, 935 (Mo. App. 1983). The contention that the challenged evidence falls within the ultimate or inevitable discovery exception to the exclusionary rule is without merit. Although Nix v. Williams, 104 S.Ct. 2501 (1984), requires less than the standard set forth in State v. Byrne, 595 S.W.2d 301 (Mo. App. 1979), *cert. denied,* 449 U.S. 951 (1980), the former still mandates that the prosecution establish "by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means. . . ." 104 S.Ct. at 2509. The State has not done so. Nor does the good faith exception to the fourth amendment exclusionary rule articulated in the recent cases of United States v. Leon, 104 S.Ct. 3405 (U.S. 1984), and Massachusetts v. Sheppard, 104 S.Ct. 3424 (U.S. 1984), serve to salvage the pretextual "seizure" of evidence in this case. In *Leon* and *Sheppard*, the United States Supreme Court permitted the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate that later was invalidated. In *Leon* because a reviewing court found the warrant unsupported by probable cause, and in *Sheppard* because of a technical error on the part of the issuing judge. Emphasizing the deterrence rationale for the exclusionary rule, the Court reasoned that the rule cannot have any deterrent effect when the officers act upon the belief that their conduct conforms to the fourth amendment. "This is particularly true . . . when an officer acting with

objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Leon,* 104 S.Ct. at 3420. By contrast, in the case at hand all of the evidence supports a conclusion that the officers acted in bad faith without a search warrant. *Compare Sheppard,* 104 S.Ct. at 3429 ("The officers in this case took every step that could reasonably be expected of them."). Indeed, suppression of the evidence on this record is consistent with the Supreme Court's focus on deterrence in applying the exclusionary rule. The State asks the Court to ignore the motives of the arresting officers because of the existence of the parking warrant, yet if the recent pronouncements of the United States Supreme Court have any applicability to the instant appeal, it is in their acknowledgment that courts can and will consider the question of good faith, or lack thereof, on the part of the police.

The order of the trial court sustaining the motion to suppress is affirmed, and the case is remanded for further proceedings.

Andrew Jackson Higgins
Judge

BILLINGS, DONNELLY, and WELLIVER, JJ., concur; BLACKMAR, J., dissents in separate opinion filed; RENDLEN, C.J., and GUNN, J., dissent and concur in separate dissenting opinion of BLACKMAR, J.

(Filed May 29, 1985)

SUPREME COURT OF MISSOURI
EN BANC

No. 66352

STATE OF MISSOURI,
Plaintiff-Appellant,

vs.

ZOLA BLAIR,
Defendant-Respondent.

DISSENTING OPINION

I do not believe that there is basis for finding that any substantial right of the defendant was violated on the taking of her fingerprints, and so would reverse the trial court's order suppressing the fingerprints taken at police headquarters, and the defendant's confession, and would remand the case so that the prosecution may proceed.

The case involves a willful murder in the course of a heist of furniture. The defendant, after full *Miranda* warnings, admitted her participation in November of 1981 by luring the victim to the location from which he was abducted and killed. Her statement, however, was suppressed. She remains subject to prosecution, but the unavailability of her voluntary confession certainly presents a substantial obstacle to conviction. I strongly suspect that the prosecutors will not find it practicable to proceed.

Police found a palm print on the back of the victim's van. On January 22, 1982 they received a tip that "the Blairs" had been seen carrying furniture into a house. The fingerprints of three other family members were

available in law enforcement files, but none matched the palm print. The defendant's prints were not on file. There was, however, an outstanding city traffic warrant against her.

I submit that the police had not only the right but even the positive duty to obtain the defendant's fingerprints by any lawful means. The defendant could be lawfully arrested on the traffic warrant, and, having been arrested, was subject to search just as any other arrestee would be. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). If the search disclosed evidence of other crimes, this evidence could be used for prosecution. Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975). The search could include the taking of fingerprints for routine identification purposes. Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 954 (1964). Because of the outstanding traffic warrant the defendant had no privilege of withholding her fingerprints.

The defendant's excellent briefs set forth her essential contention in the following language:

> It is an abuse of police power and authority to lawfully arrest an individual for a parking warrant so that, as an incident to that arrest, they may search for and seize evidence on an exploratory basis while investigating a totally unrelated offense. . .

This proposition is unsound and is supported by no controlling authority. If the defendant is lawfully arrested the police have the right to exercise the power incident to lawful arrest. The defendant has no standing to complain simply because she was specially selected from among those subject to arrest on traffic warrants. Nor may she complain that her palm print was taken, while only one

fingerprint is customarily taken from other traffic arrestees. The extent of the fingerprint identification taken is a matter for police discretion.

The principal opinion places great store in the order of events following the defendant's arrest. I submit that the events between the time she was taken into custody on the afternoon of February 5, and the time she was released on bond on the afternoon of February 6, should be considered a single transaction. At the time of her release the police had her fingerprints. They were entitled to take them. They did not have any incriminating statement from her. After receiving *Miranda* warnings, she denied participation. The police had no more than they could have had if she had been arrested on the traffic warrant alone.

The principal opinion holds that there is a fact issue as to whether the defendant's arrest on February 5, 1982 was on a traffic warrant, as the arresting officer testified to, or on homicide charges, as is stated in the police report. It is then submitted that the trial judge had the right to resolve the conflicts in the evidence, and that, although he gave no reason for his ruling, his decision must be affirmed if it can be sustained on any basis.[1] Although I am not fully satisfied as to the standard of review, I am prepared to argue for present purposes to apply the rule of Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). The decision is legally erroneous under this standard.

There is a substantial problem when the trial judge does not indicate the basis for a decision. I do not believe that we should have to strain to find some conceivable

1. It is of interest that the challenged ruling was made by Judge Coburn on the basis of a transcript of evidence heard by Judge Levitt.

factual basis on which the trial court might have acted. The reasonable assumption is that the trial judge responded to the issues raised by the prevailing party, and agreed with the defendant's contention that an arrest could not be made on the traffic warrant for the purpose of obtaining fingerprints. Inasmuch as I do not accept the argument, I would reverse the ruling.

Uncontradicted evidence shows that the police were fully aware of the traffic warrant at the time of the February 5 arrest.[2] The defendant was booked on the traffic warrant on the morning of February 6, and held in custody until she could make bond. Had she been again fingerprinted after the booking on the traffic warrant, the fingerprinting would be valid. But it would be absurd to require the police to again take her fingerprints, when they had taken them only a few hours before. The fingerprinting thus violated no substantial right of hers.

Inasmuch as there was basis for a lawful arrest, the order of proceedings should make no difference. The time of booking on the traffic warrant is an immaterial circumstance. It would be ludicrous to suggest that suppression must be ordered because the police did not retake her fingerprints after she was booked on the traffic warrant.

Davis v. Mississippi, 394 U.S. 721 (1969), now reinforced by Hayes v. Florida, ... U.S. ....., 53 USLW 4382 (1985), stands for the proposition that a citizen whose fingerprints are not otherwise available to the police may not be subjected to investigatory fingerprinting in the absence of probable cause for arrest. These cases are

2. The arresting officer testified that he

arrested her for an outstanding city warrant and also asked her to accompany us with regards to a pickup order issued by the crimes against persons unit.

completely distinguishable for the reason that this defendant was subject to arrest. Her fingerprints were available, just as were prints already in the police files or those of people arrested for subsequent traffic violations. *Hayes* by its terms applies only to detention after the crime when fingerprinting is the sole object.

The holding is all the more unfortunate because it suppresses a voluntary confession, after proper *Miranda* warnings, under the "fruit of the poisoned tree" doctrine of Wong Sun v. United States, 371 U.S. 471 (1963). The confession was taken only after the defendant was arrested a second time, under a homicide warrant issued on probable cause because of the fingerprint correspondence. The principal opinion holds that the tree is poisoned because, without the palm prints, there would be no probable cause for arrest. Inasmuch as the prints were properly available, the poisoned tree doctrine is inappropriately applied. If the reason for the suppression is the order of events on the first arrest the holding represents a particularly unfortunate instance in which "the criminal is to go free because the constable has blundered." People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), Cardozo, Ch. J.

I agree with the principal opinion that we must depend on the trial judge for the resolution of most pretrial matters regarding the admissibility of evidence when challenged because of claim of constitutional privilege. It is the sense of § 547.200, RSMo Supp. 1984, however, that orders of suppression be reviewable on appeal, and I sense a definite feeling on the part of the legislature that admissible evidence should be suppressed only for substantial cause. Busy trial judges seldom have the opportunity to make detailed findings. The facts before the trial court were not substantially in dispute. It must be assumed that the judge accepted the defendant's contentions, as set out above and advanced. To me the question is whether a substantial privilege of the defendant's was violated. I find no legal basis for saying that it was.

The cases cited by the majority for the proposition that an arrest may not be used as a pretext for a search are distinguishable, and not helpful in solving the problem before us. In United States v. Lefkowitz, 285 U.S. 452 (1932), the court found that, while the arrest was pretextual, the items seized by the search "could not lawfully be searched for and taken even under a search warrant issued upon ample evidence." In Taglavore v. United States, 291 F.2d 262 (9th Cir. 1961), a police officer claimed to have seen the defendant commit two minor traffic violations the day before the search. He then swore out a traffic warrant and an arrest and search were made. There was no outstanding traffic warrant. The court my well have disbelieved the officer's claim.

The Missouri cases cited, State v. Goodman, 449 S.W.2d 656 (Mo. 1970), and State v. Howell, 543 S.W.2d 836 (Mo. App. 1976), involved arrests without probable cause. In *Goodman,* two men were arrested while walking down the side of a highway. The only reason for the arrest was because the men were strangers in a small town. Evidence seized incident to the arrest was suppressed. In *Howell,* a murder suspect was arrested while walking down a street. The only evidence of his involvement in the crime was that he had been seen talking to the defendant two days earlier. Because there was no probable cause for the arrest, evidence seized incident to the arrest was suppressed.

The common theme of the pretext cases is that the police arrested people without reason. The police had a valid preexisting warrant for Zola Blair's arrest. Any

procedural irregularities which occurred afterward should not invalidate the arrest. *Cf.* State v. Lamaster, 652 S.W.2d 885 (Mo. App. 1983), holding that a later valid arrest was not tainted by a shortly earlier arrest for an improper reason.

I agree that the "good faith" cases of United States v. Leon, 104 S.Ct. 3405 (1984) and Massachusetts v. Shepherd, 104 S.Ct. 3424 (1984) are not directly on point, but find them to be indicative of a trend of limiting the operation of the exclusionary rule to cases of deprivation of substantial rights. The rule is designed not as an obstacle course for the police, but as a protection to the citizenry against invasion of privileged territory. It should not be applied to Zola Blair's fingerprints, which are not in the privileged area.

Nix v. Williams, 104 S.Ct. 2501 (1984) I find much more in point. There the court gave precedence to substance over form in holding that the fruits of an illegal custodial interrogation (a dead body) would not be suppressed, because normal degenerative processes would have betrayed the body's presence at some point. I do not argue that the defendant's fingerprints would have been discovered inevitably, but simply contend that they were available to the police during the defendant's initial detention and therefore not tainted by questioning and detention for a homicide investigation.

The order of suppression should be reversed and the case remanded for further proceedings.

Charles B. Blackmar
Judge

APPENDIX A(2)

(Filed July 3, 1984)

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 35622

STATE OF MISSOURI,
Appellant,

vs.

ZOLA BLAIR,
Respondent.

Appeal From the Circuit Court of Jackson County
Honorable H. Michael Coburn, Judge

Before Pritchard, P.J., Manford and Nugent, JJ.

Pursuant to § 547.200.1, RSMo (L. 1983, p. ....., H.B. No. 279, § 1), the State of Missouri appeals from an order of the trial court sustaining respondent's motion to suppress evidence, suppress statements and quash warrant. The order specified that these matters be suppressed: "1. The palm prints recovered from defendant on February 5, 1982. 2. Any statements made by defendant, whether written or oral, on February 5, 1982 to Officers of the Kansas City, Missouri Police Department. 3. Any statements made by defendant, whether oral or written on February 8, 1982 to Officers of the Kansas City, Missouri Police Department. The arrest warrant issued by the Associate Circuit Court on February 8, 1982 is hereby QUASHED."

The appeal in this case was originally lodged in the Supreme Court of Missouri. Respondent filed a motion therein to transfer this case to this court on the ground of lack of jurisdiction in the Supreme Court. After briefs of the parties and suggestions on the issue of possible conflict between the Legislative enactment § 547.200.3, and Const. Mo. Art. V, § 3, the Supreme Court transferred this case to this court, which herein proceeds to rule the question of the suppression of evidence and quashing of the subsequent arrest warrant. This court assumes, without deciding, that jurisdiction is existent, and leaves it to the parties further to question that matter in further proceedings.

On November 24, 1981, the body of Carl Lindstedt was found in a Swope Park lagoon. A latent palm print was found behind the passenger door in his truck. That print was the only solid lead which the Kansas City, Missouri, Police Department had regarding the homicide of Lindstedt. On January 22, 1982, Kevin Pose, an investigator, received a telephone call from a tipster who gave him information implicating respondent (and others in the family) in Lindstedt's murder. The next day Detective Lauffer of the Police Department requested that the latent palm print be compared with those of Warnetta, James, Darrell and Zola Blair.

The latent print examiner informed Lauffer that the print did not match those of Warnetta, James or Darrell, but no palm print of respondent could be found in the police files for comparison. On January 28, Lauffer requested that respondent be picked up for homicide but he did not ask for a homicide arrest or search warrant because he believed that there was not enough evidence to seek the warrants at that time.

At 3:00 p.m., on February 5, 1982, Patrolman Ralph Stewart and another officer made a residence check at the home of respondent's mother and arrested respondent on an outstanding city warrant (for a parking violation) and also asked her to accompany them on the homicide pickup order. Stewart testified that he went to the residence to pick her up on the homicide pickup, and he did not have an arrest warrant. He advised respondent of her constitutional rights against self-incrimination because he knew that she was to be interrogated regarding a homicide. The Miranda warnings are not given on arrests for parking violations which do not involve criminal activity.

Respondent was then taken to the homicide unit at the Police Department's downtown station and was there booked, not for the parking violation at the district station on 63rd Street but on a state charge for homicide. Stewart testified that the normal procedure for booking a person on a municipal court parking violation is to take the person to the district station; verify the warrant through the warrant service unit; fill out a form (85 PD) with basic information about the arrestee; the arrest location, the warrant purpose, the bond amount and court date; obtain one fingerprint of the person; and allow the person to remain at the district station for four hours in order to post bond. Stewart took respondent to the main station at 1125 Locust to book her on the traffic violation warrant because he believed that the state charge took precedence over the city warrant. Once she was booked for homicide, she was under arrest upon that charge.

Julia Borjon, the jail detention officer for the Police Department, took respondent's palm and fingerprints, not being aware of any search warrant authorizing the taking of her palm prints, and she did not say anything to re-

spondent as to whether she had a right to refuse to be fingerprinted.

At 4:10 p.m., February 5, Detective Cline interrogated respondent who was then under arrest for homicide. She denied any knowledge of any homicide. After that interrogation, Cline requested that the respondent's palm print taken at the jail be compared with that taken from the victim's vehicle.

Respondent was released at 10:45 a.m. the next day from detention for homicide because there was not enough evidence to charge her with homicide or to hold her. Fourteen minutes later she was booked on the municipal court parking warrant, and her right index fingerprint was taken on the back of form 85 PD. At 12:55 p.m., she posted bond on that violation and was released.

On February 8, 1982, Richard Schwieterman, latent print examiner for the Police Department, informed the homicide unit that respondent's palm print matched the one found in the victim's vehicle. At 4:33 p.m. on that day, the unit sought and received from Associate Circuit Judge Hughes a warrant for respondent's arrest on a homicide charge, she was arrested at home at 5:30 p.m., and booked for first degree murder at 5:58 p.m. Then, at 6:15 p.m., Cline checked respondent out of the detention unit in order to interrogate her. At first she denied knowledge, but Cline confronted her with the evidence of her palm print in the victim's truck, and got her to start talking about the events of the evening of the victim's death because she could not explain away the palm print. Cline took her statement in which she confessed to being near the victim's truck at the time of his death.

In contending for the reversal of the trial court's order of suppression of evidence and the quashing of the arrest

warrant of February 8, 1982, the state relies upon United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); and Gustafson v. Florida, 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973). The facts in those cases render little solace to the state's contention, which facts are inapposite to those here. In Robinson, there was a valid probable cause, full-custody arrest of defendant for operating a motor vehicle after revocation of his operator's permit, which justified a full-custody, on-the-scene search of his person without a search warrant in which heroin was found in a crumpled cigarette package on his person. In Gustafson, also, there was a valid arrest of petitioner for driving his automobile without a valid operator's license, which justified a full search of petitioner's person incident to the arrest.

In this case, the warrant of arrest issued was for the minor offense of a parking violation, and the arresting officer on that warrant testified that there was also to be a "pick-up" on the matter of the homicide. There was no valid arrest warrant issued on the homicide charge, and indeed, it was conceded that at the time there existed no probable cause for the issuance of a warrant. It follows that there was no probable cause to "book" respondent on the homicide charge, nor at that time was there any probable cause for her arrest (Stewart testifying that she was under arrest upon being booked for homicide). It follows that there was no justification for the "search" of her palm prints because there existed no probable cause for her arrest. See and compare Brown v. Illinois, 422 U.S. 590, 605, 95 S.Ct. 2254, 2262, 45 L.Ed.2d 416 (1975), where arrests made for "investigatory" purposes on less than probable cause were disapproved, the court noting, "The detectives embarked upon this expedition for evidence in the hope that something might turn up." Note also the

case of Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), holding that where there was a lack of probable cause for arrest, a "pickup" of petitioner on suspicion and a subsequent interrogation of him violated his Fourth and Fourteenth Amendments rights. See also Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), where there was no warrant or probable cause for arrest, detention of petitioner during which two sets of fingerprints were taken from him and he was also interrogated which required reversal, the court quoting from Mapp v. Ohio 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), "* * * 'all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.' * * * Fingerprint evidence is no exception to this comprehensive rule."

The state, however, contends that the parking violation warrant, being valid, justifies the taking of respondent's palm print. The further facts refute that contention, because they clearly show that the issuance and execution of the parking violation warrant was but a subterfuge or pretext for the purpose of gathering evidence of the entirely separate crime of homicide. Nothing in the taking of respondent's palm print tended to show any purpose to gather any fruits of the misdemeanor offense of a parking violation, mentioned at 414 U.S. 233, 94 S.Ct. 476, of the Robinson case, supra.

At the outset, the police had no solid lead on the murder of Lindstedt except for the palm print of some unknown person found in his truck. It was not until almost two months later that the tipster implicated respondent and other members of her family. The three prints in the police files did not match the palm print found in the truck, but the police files did not contain prints

of respondent. Thus, the police in pursuing the matter must have decided to use the outstanding traffic violation warrant as a means of procuring respondent's palm print, as is clearly inferable. In arresting respondent on the traffic violation warrant, the police did not even follow the department's normal procedures, but subjected her to being brought to the police headquarters, booked her for homicide (without a warrant), took her full palm print, and held her until the next day, when she was released. Shortly afterwards, on finding the respondent's palm print matched that found in the truck, she was arrested on the warrant for homicide.

Although holding that there was no evidence to support a contention that the arrest for a traffic violation was a pretext, and that the arrest was lawful, the court in State v. Moody, 443 S.W.2d 802, 804[2-3] (Mo. 1969), commented: "An exception to the general rule [that a search and seizure incident to the lawful arrest is permissible] is that an 'arrest may not be used as a pretext to search for evidence * * *.' United States v. Lefkowitz, 285 U.S. 452, 467, 52 S.C. 420, 76 L.Ed. 877 (1932). We are of the opinion that the 'pretext' standard, at least in cases involving searches of the person, is sufficient to judge the validity of searches and seizures incident to a lawful arrest for traffic violations. If the arrest for a traffic violation is used as a *pretext* for conducting the search, the proceeds of the search incident thereto will be inadmissible. The question of good faith on the part of arresting officers is capable of adjudication." [Brackets added.] In the there cited authority 1 Varon Searches, Seizures and Immunities (1961-1974) 260, 261, it is said, "Upon occasion where an accused is under surveillance by police officers who are acting upon an anonymous tip or even upon reliable information by third persons concerning an illegal operation,

and there are not sufficient facts or probable cause to avail themselves of the benefit of a warrant of arrest or search warrant, the officers often seize upon the slightest infraction so that an 'on view' arrest can be made and a search justified as the basis on an incident to arrest." At page 207, et seq. of the Varon text are listed cases from other jurisdictions, which not need be further cited, most holding that an arrest may not be used as a pretext for gathering evidence. This case fits into that category.

In Taglavore v. United States, 291 F.2d 262 (C.A. 9th 1961), police officers went to a cab company and arrested its owner for narcotics violations. Inspector Calhoon suspected that appellant was connected in some way with the narcotics violations and gave to two investigators a warrant for appellant's arrest. The warrant was not for the narcotics violations, but for two minor traffic violations which Calhoon testified he had personally witnessed the night before, but did not then stop appellant or issue a traffic citation because he was busy doing other police work. Instead he waited until the afternoon of the next day to swear out the arrest warrant. When he delivered the warrant to the investigators Calhoon directed them to go out and find appellant, and told them that there was an excellent chance that he would have marijuana cigarettes in his possession when they found him. On arresting appellant there was a struggle and he was choked until he opened his mouth and the remains of a marijuana cigarette was removed from it. The court, in reversing the conviction, found that the traffic warrant was being used as a mere excuse to search appellant for marijuana cigarettes, saying at page 265[2-5], "Where the arrest is only a sham or a front being used as an excuse for making a search, the arrest itself and the ensuing search are illegal. (Citing cases.) To put it in other words, the *search* must be incident to the *arrest*, and not vice versa."

Although the Missouri Supreme Court in State v. Moody, supra, declined to follow the broad holding of Amador-Gonzalez v. United States, 391 F.2d 308, 315[10] (C.A.5th 1968), that "a lawful arrest of an automobile driver for a traffic offense provides no lawful predicate for the search of the driver or his car—absent special circumstances.", that case also involved a pretextual traffic arrest to enable officers to search Gonzalez and his car, a practice which was condemned.

In State v. Hoven, 269 N.W.2d 849 (Minn. 1978), there was a pretextual arrest of defendant for his failure to appear in response to minor traffic violations, and thereafter a search was made of his truck from which marijuana was seized. The court reversed the conviction on its holding, p. 853[6], "Since a pretext arrest is per se illegal, evidence obtained as a result of that arrest is inadmissible. Therefore, the open paper bag containing marijuana discovered in defendant's truck should have been suppressed as the product of an illegal arrest." See also the there cited case, State v. Curtis, 190 N.W.2d 631, 634 (Minn. 1971), noting that "'[c]ourts uniformly have forbidden the use of a minor traffic offense as a pretext for searches directed at unrelated offenses.'" Riddlehoover v. State, 198 So.2d 651 (Fla.App. 1967); People v. Siegel, 291 N.W.2d 134 (Mich.App. 1980); Graham v. State, 60 So.2d 186 (Fla. 1952); State v. Lahr, 560 P.2d 527 (Mont. 1977); and compare the cases collected in Anno. 10 ALR 3rd 314, 322, § 4, 338, § 8[a].

Under the foregoing cases and authority, and under the evidence in this case, it appears beyond peradventure that respondent's arrest on the parking violation charge was but a pretext, motivated by the police officers' desire to gather evidence, in violation of her Fourth and Four-

teenth Amendments rights of the United States Constitution.

Because respondent's arrest was pretextual and thus illegal, it follows that her confession taken as a followup of that illegal taint was a "fruit of the poisonous tree". Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

It follows that the trial court did not err in suppressing respondent's palm prints taken from her on February 5, 1982, and any statements taken from her, and in ordering the quashal of the arrest warrant (for homicide) of February 8, 1982.

The judgment is affirmed.

All concur.

Jack P. Pritchard
Presiding Judge

APPENDIX B

IN THE
SUPREME COURT OF MISSOURI
EN BANC

No. 66,352

STATE OF MISSOURI,
Appellant,
vs.
ZOLA BLAIR,
Respondent.

APPELLANT'S MOTION FOR REHEARING

The State of Missouri appears by and through its attorneys, Albert Riederer, Prosecuting Attorney of Jackson County, Missouri, and Robert Frager, Assistant Prosecuting Attorney, and respectfully moves for a rehearing in the above-styled case for the following reasons:

1. This Court misinterpreted material matters of both law and fact when it applied the so-called "pretextual arrest" doctrine to the facts of the present case, since the overwhelming weight of authority clearly holds that an arrest, whatever the subjective motivations of the arresting officers, cannot be "pretextual" where, as here, the police have a valid, outstanding warrant for the defendant's arrest;

2. This Court misinterpreted and misapplied *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), and *Hayes v. Florida*, ... U.S. ....., 105 S.Ct.

1643, ... L.Ed.2d ..... (1985), which hold that, in the absence of probable cause to arrest, the police may not detain an individual for investigation. These cases are utterly inapplicable to a situation where, as here, the police possess a warrant for the defendant's arrest;

3. This Court misinterpreted and misapplied *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), by construing that case to require the *per se* exclusion of the statement obtained from the respondent after what the majority of this Court held was a "pretextual arrest". In fact, it is well settled that an illegal arrest does not necessarily render inadmissible a subsequent statement. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *State v. Olds*, 569 S.W.2d 745, 747-748[1-2] (Mo. banc 1978); *State v. Branstuder*, 583 S.W.2d 187, 189-190[3] (Mo.App., W.D. 1979); *State v. McMahan*, 583 S.W.2d 540, 544-545[11-12] (Mo.App., S.D. 1979);

4. This Court misapplied and misinterpreted the "inevitable discovery" doctrine recognized by the United States Supreme Court in *Nix v. Williams*, ... U.S. ....., 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), and applied by this Court in *State v. Butler*, 676 S.W.2d 809, 812-813[3-4] (Mo. banc 1984). This Court, with little or no discussion or analysis, simply opines that the State failed to establish that the evidence uncovered by the arrest would have come to light by lawful means, overlooking the obvious fact that, sooner or later, the respondent would, in fact, have been arrested pursuant to the parking warrant and that the police could have taken her fingerprints at that time;

5. This Court overlooked and misinterpreted a material matter of law and fact when it attempted to distinguish

State v. Hunter, 625 S.W.2d 682 (Mo.App., E.D. 1981), on the ground that *Hunter* merely sanctioned the taking of a second set of the defendant's fingerprints after the first set was suppressed by the trial court as the fruit of a "pretextual arrest". Unless *Hunter* is squarely overruled by this Court, the State, under *Hunter*, could simply petition the trial court for an order under Rule 25.06(B), V.A.M.R., to refingerprint the respondent, and this Court's opinion will have had little or no practical effect, except to require the suppression of the respondent's statement which, under *Brown v. Illinois, supra*, was clearly admissible regardless of the validity of the respondent's arrest;

6. This Court misinterpreted and overlooked a material matter of fact and law when it held that the "good faith" cases of *United States v. Leon*, ... U.S. ....., 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and *Massachusetts v. Shepherd*, ... U.S. ....., 104 S.Ct. 3424 (1984), were inapplicable because the police "acted in bad faith without a search warrant". In fact, the police clearly acted in good faith, with an arrest warrant, and, in view of *Hunter*, could reasonably have believed that the existence of that warrant authorized the custodial arrest of the respondent.

Respectfully submitted,

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IN THE
SUPREME COURT OF MISSOURI
EN BANC

No. 66,352

STATE OF MISSOURI,
Appellant,

vs.

ZOLA BLAIR,
Respondent.

SUGGESTIONS IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING

The issue presented by this case is relatively simple: Where the police are aware of the existence of an outstanding arrest warrant for a relatively minor offense, are they precluded from arresting an individual on the basis of that warrant if their chief purpose in making the arrest is to obtain evidence of a more serious offense, for which they lack probable cause to arrest? In other words, is that individual immunized from arrest for the less serious offense because of the subjective intent of the arresting officers?

The answer, obviously, should be no. But incredibly, a four-judge majority of this Court, in an opinion issued on May 29, 1985, reached a contrary conclusion, holding that the respondent's arrest was "pretextual", notwithstanding the existence of a prior arrest warrant that was concededly valid and which authorized the custodial arrest of the respondent.

Like the Court of Appeals and the Circuit Court, the majority of this Court misunderstands and misapplies the

"pretextual arrest" doctrine. An arrest is "pretextual", and therefore invalid, when the police lack probable cause to make a custodial arrest for *any* offense. See *Speake v. Grantham*, 317 F.Supp. 1253, 1267-1268 (S.D. Miss. 1970), and cases cited and discussed at pages 16-24 of the brief filed by the *amicus curiae* in this case.

The majority opinion presently holds that each of these cases is "readly distinguishable" because they involved a situation where the defendant committed an offense in the presence of the officers, who immediately conducted an arrest and a search incident thereto. Slip opinion, at 7-8. This is a distinction without meaning. Essentially, the defendants argued in those cases that the traffic arrests were just pretexts to search for evidence of more serious crimes for which the police lacked probable cause to arrest. Those arguments were rejected on the ground that the subjective intent of the police officers was irrelevant so long as the arrest would have occurred anyway, even absent the officers' suspicions that the arrestee was involved in more serious criminal conduct.

The only viable distinction between those cases and the present appeal does not favor the respondent: In those cases there existed the possibility that, despite the officers' testimony to the contrary, there was no basis for the traffic arrests. Here, the arrest warrant predated any suspicions the police might have had concerning the respondent's involvement in the homicide. There is, therefore, no basis for arguing that the arrest on the parking warrant was unlawful.

The cases upon which this Court places principal reliance, *United States v. Prim*, 698 F.2d 972 (9th Cir. 1983), and *United States v. Millio*, 588 F.Supp. 45, 48-49 (W.D. N.Y. 1984), do not, as this Court mistakenly believes, sup-

port the theory that a valid arrest on traffic or parking warrants can be rendered "pretextual" and therefore invalid because of the subjective intent of the arresting officers.

To begin with, the precedential weight of *Prim* is questionable at best, since the two judges who formed the majority in *Prim* wrote separate opinions and could not agree on a common basis for their decision. However, neither judge appeared to believe that the arrest in *Prim* was authorized, even by the existence of a state warrant for nonsupport. The court, which ordered the suppression of narcotics found on the defendant's person during a pat-down search by DEA agents at a Portland, Oregon, airport, apparently believed that the DEA agents did not possess any statutory authority to arrest on the basis of a state warrant and that, in any event, they did not purport to use the arrest warrant as justification for their detention of the appellant. *United States v. Prim, supra,* 698 F.2d at 978.

Consequently, *Prim* is not a case where there was an admittedly valid arrest based on an outstanding warrant. The same is true with respect to *Millio.* In that case, the court made it clear that the existence of a "scofflaw" against the car registration—which was used as an excuse to detain the defendant—provided no grounds for either arresting the driver or repossessing the car. *United States v. Millio, supra,* 588 F.Supp. at 47. Neither case, then, involved a situation where the police were justified in arresting the defendant for a minor offense, but were more interested in questioning him about a more serious crime for which they lacked probable cause to arrest.

This Court also misinterprets and misapplies *Davis v. Mississippi,* 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), and *Hayes v. Florida,* ..... U.S. ....., 105 S.Ct.

1643, ... L.Ed.2d ..... (1985), which hold only that in the absence of a warrant or probable cause to arrest, the police may not detain an individual for investigation. Here, unlike *Davis* or *Hayes,* the police *had* a warrant. That, of course, is the crucial distinction between this case and *Davis* and *Hayes,* but it seems to somehow have escaped the majority of this Court.

This Court also has overlooked the holding in *Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), which clearly holds that an unlawful arrest does not necessarily invalidate a subsequent custodial statement, at least where *Miranda* warnings have been given. Although *Miranda* warnings, standing alone, do not automatically remove the "taint" of an unlawful arrest, factors to be considered are the temporal proximity of the arrest and the confession, whether or not *Miranda* warnings were given, the purpose and flagrancy of official misconduct, whether the confession was obtained by incommunicado interrogation in a coercive environment, the duration of the questioning, whether or not the accused was allowed to communicate with the outside world, the attitude of the police toward the suspect, his physical and mental state, age, intelligence, educational level and whether he was subjected to physical punishment. *State v. McMahan,* 583 S.W.2d 540, 544-545[11-12] (Mo.App., S.D. 1979). *See also State v. Olds,* 569 S.W.2d 745, 747-748[1-2] (Mo. banc 1978); *State v. Branstuder,* 583 S.W.2d 187, 189-190[3] (Mo. App., W.D. 1979).

This Court's opinion is devoid of any reference to *Brown, McMahan* or any of the factors which should have been weighed in determining the admissibility of the respondent's statement. In fact, her statement was clearly admissible, even if her arrest was illegal, since the evidence

established that she had received *Miranda* warnings, was not subjected to prolonged interrogation or otherwise coerced into making an involuntary statement; her admissions were "'" sufficiently an act of free will to purge the primary taint."'" *State v. McMahan, supra,* 583 S.W. 2d at 544-545[12].

Another material matter of fact or law overlooked or misinterpreted by this Court is its failure to recognize the applicability of the "inevitable discovery" doctrine of *Nix v. Williams,* ..... U.S. ....., 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), and the "good faith" exception to the exclusionary rule recognized in *United States v. Leon,* ..... U.S. ....., 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and *Massachusetts v. Sheppard,* ..... U.S. ....., 104 S.Ct. 3424, ... L.Ed.2d ..... (1984).

As to the inevitable discovery doctrine, this Court, with no analysis or discussion whatsoever, simply concludes that the State failed to establish that the evidence uncovered by the arrest would have come to light by lawful means. Slip opinion, at 9. This conclusory statement overlooks the obvious: Since the police possessed a warrant for the respondent's arrest, it was inevitable that she would have been arrested at some time, and the police could have taken her fingerprints once she was taken into custody. The absurdity of this Court's present opinion is that it would require the police to sit on their hands and wait—perhaps for months or even years—until, in the regular course of events, the arrest warrant was served. In the meantime, the police presumably would have to twiddle their thumbs, and put their investigation into the homicide on hold.

This Court also overlooks or misinterprets a material matter of fact when it contends that the police acted in

"bad faith" in arresting the respondent on a valid warrant. Such a conclusion is simply preposterous. The court makes no effort to explain such a bizarre statement, which is simply not susceptible to a rational explanation. Again, it must be emphasized that there existed a valid, pre-existing warrant for the respondent's arrest. Under *State v. Hunter,* 625 S.W.2d 682 (Mo.App., E.D. 1981), a reasonable police officer could easily have believed that their suspicions of the respondent's involvement in the homicide did not preclude a custodial arrest of the respondent on the outstanding arrest warrant. It would, indeed, be difficult to find a more obvious example of "good faith" conduct.

This Court attempts to distinguish *Hunter* on the ground that it merely sanctioned the re-fingerprinting of a defendant after the trial court had suppressed the first set of fingerprints, apparently on the "pretextual arrest" theory. In *Hunter,* of course, the defendant was arrested on the basis of outstanding warrants from several municipalities, even though the police's real purpose in apprehending the defendant was so that he could be interrogated by federal postal authorities about a stolen check. *Id.,* 625 S.W.2d at 683.

Although the actual holding of *Hunter* was that the re-fingerprinting of the defendant was not unlawful, the court, in a footnote, suggested that the suppression of the initial set of fingerprints was unnecessary, observing that, "[a]t the time of the fingerprinting, defendant was in lawful custody of the Wellston Police" and that this "permitted the lawful taking of defendant's fingerprints as a matter of routine police procedure." *Id.,* 625 S.W.2d at 683 n. 1.

This Court's opinion is strangely silent about this portion of *Hunter.* Even if the statement is *dicta,* it would

furnish a basis for reasonable reliance by police personnel and would lead even a person with legal training to believe that the existence of the arrest warrant authorized the police to take the respondent's fingerprints in this case, even though their principal purpose was to investigate the respondent's possible connection with the homicide. How, then, can it be said that the police acted in "bad faith"?

The *Hunter* case presents still another issue unresolved by this Court's opinion: Since this Court did not overrule *Hunter,* and since *Hunter* clearly sanctions the taking of a second set of the defendant's fingerprints pursuant to the Rules of Criminal Discovery, particularly Rule 25.06(B), V.A.M.R., this Court's affirmance of the trial court's order would not prevent the State from taking a second set of the respondent's fingerprints since, as in *Hunter,* "[t]he police did not initiate their investigation of defendant, or focus on [her] as a suspect, because of the suppressed fingerprints." *Id.,* 625 S.W.2d at 684 n. 3. Thus, as a practical matter, the only real effect of this Court's decision is to require the suppression of the respondent's statement, a result that is contrary to *Brown v. Illinois, supra,* and a myriad of other Missouri appellate decisions which clearly indicate that, while "[c]ourts have been requested to invoke a 'but for' test which might compel the exclusion of all statements following an illegal arrest, . . . they have refused to do so". *State v. McMahan, supra,* 583 S.W.2d at 540.

In summary, then, this Court has seriously erred in misapplying and misinterpreting the "pretextual arrest" doctrine to the present case, which involves an arrest justified by a valid warrant; has overlooked and failed to apply *Brown v. Illinois, supra,* which does not require the automatic suppression of a statement made by a person un-

lawfully arrested; failed to correctly interpret and apply the "inevitable discovery doctrine" to the present case, when it was inevitable that the respondent, at some time in the future, would have been apprehended on the arrest warrant; and failed to recognize the applicability of the "good faith" exception to the exclusionary rule, since, in view of the existing precedents, such as *State v. Hunter, supra,* the police could only have reasonably believed that they were justified in arresting the respondent on the parking warrant, even though their principal purpose was to investigate the respondent's possible connection with the homicide.

A rehearing should be granted in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Photocopies of this motion for rehearing and the accompanying suggestions were mailed, postage prepaid, this 12th day of June, 1985, to:

Mr. Joseph Locascio
Special Public Defender
505 E. 13th Street, 4th Floor
Kansas City, MO 64106

and

Mr. Philip M. Koppe
Assistant Attorney General
Penntower Office Center, Suite 609
3100 Broadway
Kansas City, MO 64111

/s/ Robert Frager by Philip M. Koppe
Robert Frager

APPENDIX C

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

June 25, 1985

Mr. Joseph Locascio
Courthouse, 4M/West
415 E. 12th
Kansas City, Missouri 64106

In re: State of Missouri vs. Zola Blair
No. 66352

Dear Mr. Locascio:

This is to advise that the Court this day entered the following order in the above entitled cause:

"Respondent's motion for rehearing overruled,"

Very truly yours,

/s/ Thomas F. Simon
Clerk.

cc: Mr. Robert Frager
Mr. Philip M. Koppe

OPPOSITION BRIEF

No. 85-303

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

STATE OF MISSOURI,

Petitioner,

vs.

ZOLA BLAIR,

Respondent.

On Petition for Writ of Certiorari to the Missouri Supreme Court, En Banc.

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH H. LOCASCIO
Special Public Defender
505 East Thirteenth Street
Fourth Floor
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816/881-3420

Attorney for Respondent
Zola Blair

QUESTIONS PRESENTED

Is it a violation of the Fourth Amendment for police to "book" and detain a person overnight for a homicide without probable cause or other lawful authority when an arrest warrant exists for the person for a parking violation?

Is it a violation of the Fourth Amendment for police to conduct a warrantless search for and seizure of a person's palm prints pursuant to a homicide investigation when the person has been arrested and detained for the homicide without an arrest warrant or other lawful authority but while also an arrest warrant exists for the person for a parking violation?

Is it a violation of the Fourth and Fourteenth Amendments for police to arrest a person on the pretext of executing a parking violation warrant so that custody of the person can be obtained to conduct a warrantless search for and seizure of the person's palm prints pursuant to the investigation of a homicide no probable cause exists to believe the person committed?

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TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR DENYING THE WRIT

1. The decision below has not been shown to conflict with any decision of another state court of last resort or with any decision of this Court.

2. The decision below is consistent with prior decisions of this Court that an arrest may not be used as a pretext to search for evidence.

3. The decision below was correctly decided for reasons independent of any pretext arrest doctrine enunciated by prior decisions of this Court.

1. The decision below has not been shown to conflict with any decision of another state court of last resort or with any decision of this Court.

Petitioner, the State of Missouri, requests this Court to review the decision of the Supreme Court of Missouri, en banc, based upon the allegation that the decision below is in conflict with Davis v. Mississippi, 394 U.S. 721 (1969) and Hayes v. Florida, 105 S.Ct. 1643 (1985). Petitioner has misread both the decisions of this Court in Davis and Hayes, and the decision below. The Supreme Court of Missouri did not hold that pursuant to Davis and Hayes a pretextual arrest violates the Fourth Amendment to the United States Constitution. Rather, it merely held that Davis and Hayes stand for the proposition that fingerprint evidence obtained in violation of the Fourth Amendment should be excluded from evidence. Pet. for Cert. at A4. At no time does the decision below interpret Davis and Hayes to stand for the proposition that fingerprint evidence seized

subsequent to a pretextual arrest violates the Fourth Amendment.

Petitioner alleges that the Missouri Supreme Court "misconstrued and misapplied" United States v. Robinson, 414 U.S. 218 (1973) and Gustafson v. Florida, 414 U.S. 260 (1973). These cases create an exception to the Fourth Amendment warrant requirement by holding a valid custodial arrest, without more, justifies a search of the person of the arrestee incident to the arrest. This proposition is found and was recognized and followed by the court below. Petitioner fails to point out that the Missouri Supreme Court questioned the validity of the arrest of respondent in the first instance. That court analyzed the conflicting evidence on whether respondent was initially arrested on the basis of a valid parking violation warrant or for a homicide there was no probable cause to believe she committed. Its conclusion was that conflicting evidence was for the trial court to resolve and that court resolved the factual dispute in favor of respondent. Pet. for Cert. at A6. Indeed, the court pointed out the evidence to conclude respondent was arrested for homicide and not for a parking violation:

> [Officer Stewart] testified that he went to [respondent's] residence to take her into custody on the homicide pickup order and he did not have an arrest warrant. He advised [respondent] of her constitutional rights in compliance with Miranda although such warnings are not given on arrests for parking violations that do not involve criminal activity. Officer Stewart's partner, Officer, Thomas, filed the report of the arrest under the homicide charge number as "investigation arrest-criminal homicide"; and the officers followed the procedure used for arresting and booking an individual on a homicide charge rather than that used for a traffic violation. [Respondent] was taken to the homicide unit at the police department's downtown station and booked there on a state charge for homicide, not for the parking violation at the district station on 63rd street. Under the normal procedure for booking a person on a municipal court parking violation, the police obtain one fingerprint of the person and allow the person to remain at the district station for four hours in order to post bond. In this case, the suspect was taken to the homicide unit where a complete set of [respondent's] palm and finger prints was taken, she underwent interrogation regarding the homicide, and was detained overnight. It was after all this that the police booked her on the parking violation. Pet. for Cert. at A5-A6.

The factual finding, therefore, was that the search for and seizure of respondent's palm prints were not incident to a valid arrest, but rather made subsequent to her illegal arrest for homicide.

Petitioner contends the court below applied a "per se rule in affirming the suppression of respondent's confession made subsequent to her second arrest pursuant to arrest warrant for homicide. Assuming the search for and seizure of respondent's palm prints were in violation of the Fourth Amendment, there is no question, and the petitioner raises none, that the arrest warrant for homicide was the "fruit of a poisonous tree." The Missouri Supreme Court noted:

> Because the illegally seized [palm prints] provided the sole basis for the arrest warrant for homicide of February 8, 1982, and led directly to respondent's statements on that day, the warrant and statement are also inadmissible as "fruits of the poisonous tree." Wong Sun v. United States, 371 U.S. 471 (1963). See State v. Hoven, 269 N.W.2d 849, 854 (Minn. 1978); State v. Mayes, 654 S.W.2d 926, 935 (Mo.App. 1983). (emphasis added). Pet. for Cert. at A9-A10.

The court's conclusion that the illegal seizure of respondent's palm prints led directly to her subsequent inculpatory statement is supported by its earlier recitation of these facts:

> On February 8, 1982, upon learning that [respondent's] print matched the print found at the scene of the crime, police sought and received an arrest warrant on the homicide. She was arrested at 5:30 p.m. on that day and and booked shortly thereafter. During an interrogation that began at 6:15 p.m., officers confronted her with evidence of the matching prints and obtained inculpatory statements. Pet. for Cert. at A3.

Petitioner's claim that the court below applied a "per se" rule in affirming the suppression of respondent's statements is unsubstantiated. Clearly, the causal chain between the illegally seized palm prints and respondent's statements had not been broken; but regardless of whether it had or not, the court below based its decision on the principles announced by this Court in analyzing the

admissibility of inculpatory statements made subsequent to a search and seizure in violation of the Fourth Amendment. Brown v. Illinois, 422 U.S. 590 (1975).

Petitioner's assertion that the court below "misconstrued and misapplied" United States v. Leon, 104 S.Ct. 3405 (1984) and Massachusetts v. Sheppard, 104 S.Ct. 3424 (1984) is completely off the mark. Those cases are not applicable to the facts of this case; the court below merely mentions them in pointing out the growing concern this Court has for the subjective intent of law enforcement authorities. Here, the court below noted there was no "good faith" in the seizure of respondent's palm prints; rather, there was "bad faith" since police knew there was no probable cause to arrest respondent for homicide and no lawful authority existed to seize her palm prints pursuant to that investigation.

Finally, petitioner claims the decision of the court below is inconsistent with the "inevitable discovery" doctrine announced by this Court in Nix v. Williams, 104 S.Ct. 2501 (1984). The Missouri Supreme Court observed that:

> [a]lthough Nix v. Williams, 104 S.Ct. 2501 (1984), requires less than the standard set forth in State v. Byrne, 595 S.W.2d 301 (Mo.App. 1979), Cert. denied, 449 U.S. 951 (1980), the former still mandates that the prosecution establish "by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... ." 104 S.Ct. at 2509. Pet. for Cert. at A10.

Since Davis v. Mississippi, 394 U.S. 721 (1969) and Hayes v. Florida, 105 S.Ct. 1643 (1985) hold that fingerprint evidence falls within the Fourth Amendment protection against unreasonable searches and seizures, it is unclear how petitioner reasons respondent's palm prints would have inevitably been discovered when no probable cause existed that the latent palm print police were attempting to identify belonged to respondent. At the very least, petitioner has failed to demonstrate that the decision below in this regard is in conflict

with Nix, supra.

2. The decision below is consistent with prior decisions of this Court that an arrest may not be used as a pretext to search for evidence.

This Court held in United States v. Lefkowitz, 385 U.S. 452 (1932) that an arrest may not be used as a pretext to search for evidence. As noted in 1, supra, conflicting evidence existed as to whether respondent was validly arrested in the first instance. Nevertheless, assuming that respondent had been validly taken into custody pursuant to the parking violation warrant for her arrest, the factual question as to why the police were executing this arrest was resolved thus:

> Assuming an arrest for the parking violation, the arrest, and the circumstances of this case, was at best a pretext employed to gether evidence on an unrelated homicide, and this Court cannot say, on this record, that the trial court erred in suppressing the evidence so seized. A well established limitation on on [sic] the search incident to a valid arrest exception is the rule that an arrest may not be used as a pretext to search for evidence. United States v. Lefkowitz, 285 U.S. 452 (1932); Taglavore, 291 F.2d at 265; State v. Goodman, 449 S.W.2d 656 (Mo. 1970); State v. Howell, 543 S.W.2d 836, 838 (Mo.App. 1976). Pet. for Cert. at A7.

In Abel v. United States, 362 U.S. 217 (1960), petitioner argued that his administrative arrest by officers of the Immigration and Naturalization Service preliminary to his deportation was made for the real reason that the Federal Bureau of Investigation suspected him of espionage, they wanted him in custody to pressure him to confess to espionage and cooperate, and they wanted to search his belongings for evidence of espionage. Although it was held that the facts did not support petitioner's claim, Mr. Justice Frankfurter, speaking for a majority of this Court, stated:

> Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obediance to the safeguards and restrictions of the Constitution and laws of the United States. 362 U.S. at 226.

The parking violation warrant in this case is very much like an administrative warrant. Assuming that respondent was under arrest pursuant to the parking violation warrant at the time she was palm-printed, the factual issue as to the real reason the police were executing the warrant was resolved in favor of respondent and, therefore, the search for and seizure of her palm print were held to have violated the Fourth Amendment.

3. The decision below was correctly decided for reasons independent of any pretext arrest doctrine enunciated by prior decisions of this Court.

Aside from the argument that the execution of the parking violation warrant in this case was a pretext to gain custody of respondent to recover evidence of an unrelated offense, the Supreme Court of Missouri found that the evidence adduced before the trial court supported the conclusion that respondent was in fact taken into custody for homicide, without an arrest warrant or other lawful authority. Respondent has pointed out in 1, supra, that the court below viewed all the facts to support the conclusion that respondent was not even arrested pursuant to the valid parking violation warrant at the time she was palm-printed. Indeed, one of the arresting officers filed the arrest report as "investigation arrest - criminal homicide" under the homicide complaint number, respondent was booked for homicide during which her palm prints were

recovered, and she remained in jail overnight. As noted by the court below:

> She was detained for homicide overnight and released at 10:45 a.m. the next day. Fourteen minutes later she was booked on the municipal court parking warrant. At 12:55 p.m., she posted bond on the traffic violation and was released. Pet. for Cert. at A3.

The evidence clearly shows that respondent was illegally detained for homicide at the time she was palm-printed and the court below so found. Therefore, this Court should deny the writ concerning any pretextual arrest issue since an independent basis exists for the holding that respondent's palm prints were illegally seized in violation of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH H. LOCASCIO #29078
For Zola Blair

Special Public Defender
505 East 13th Street-Fourth Floor
Kansas City, Missouri 64106
816/881-3420

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI, Petitioner,	)	
vs.	)	No. 85-303
ZOLA BLAIR, Respondent.	)	

AFFIDAVIT OF PERSONAL SERVICE

I, JOSEPH H. LOCASCIO, hereby certify that on November 6, 1985, three copies of Respondent's Brief in Opposition in the case of State of Missouri, Petitioner, vs. Zola Blair, Respondent, were personally delivered to Mr. Albert Riederer, Prosecuting Attorney, Jackson County Courthouse, 415 East 12th Street, 7-M, Kansas City, Missouri 64106.

JOSEPH H. LOCASCIO #29078
Special Public Defender
505 East 13th Street-Fourth Floor
Kansas City, Missouri 64106
816/881-3420

ATTORNEY FOR RESPONDENT

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

Subscribed and sworn to before me, the undersigned Notary Public, this 6th day of November, 1985.

FRANCES M. BURDICK
Notary Public - State of Missouri
Commissioned in Jackson County
My Commission Expires March 1, 1987

Notary Public

JOINT

APPENDIX

No. 85-303

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MISSOURI,
Petitioner,

vs.

ZOLA BLAIR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT, EN BANC

JOINT APPENDIX

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Petition for Writ of Certiorari Filed August 22, 1985
Certiorari Granted January 13, 1986

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No. 85-303

In the Supreme Court of the United States

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JOINT APPENDIX

RELEVANT DOCKET ENTRIES

May 13, 1983, Indictment — Criminal Case No. CR83-2231 Circuit Court of Jackson County, Missouri

June 23, 1983, Motion to Suppress Evidence, Suppress Statements, Quash Warrant and Request for Pretrial Evidentiary Hearing

October 13, 1983, Circuit Court Order Suppressing Evidence

July 3, 1984, Missouri Court of Appeals Opinion

May 29, 1985, Supreme Court of Missouri Opinion

(Filed May 13, 1983)

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY, MAY TERM, 1983, IN DIVISION NUMBER II, THEREOF, DESIGNATED BY THE RULES OF SAID COURT AS CRIMINAL DIVISION A.

STATE OF MISSOURI,

vs.

ZOLA M. BLAIR N/F 8/18/60
4331 Forest, KCMO.
Defendant

The Grand Jurors of the County of Jackson, State of Missouri charge that the defendant, Zola M. Blair, in violation of Section 565.003 RSMo, committed the class A felony of Murder in the First Degree punishable upon conviction under Section 565.008.2 RSMo, in that on or about November 24, 1981, in the County of Jackson, State of Missouri, the defendant, Zola M. Blair unlawfully killed Carl Lindstedt by shooting and striking him causing Carl Lindstedt to die by drowning him on November 24, 1981 and such killing was committed in the perpetration of the felony of robbery on or about November 24, 1981, in violation of Section 569.030 RSMo, when defendant and others forcibly stole household furniture from

Carl Lindstedt which property was in the possession of Carl Lindstedt.

TRUE BILL

/s/ Patricia A. Hill
Foreman

ALBERT REIDERER
Prosecuting Attorney
For the County of,
Jackson, State of
Missouri, by
/s/ Patricia S. McGarry
Assistant Prosecuting Attorney

Received and filed this 13th day of May, 1983.

Bail set at $10,000.00—10%

/s/ Donald L. Mason
Circuit Court Judge

(Filed June 23, 1983)

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Docket "C"
Division 9
Case No. CR83-2231

STATE OF MISSOURI,
Plaintiff,

vs.

ZOLA M. BLAIR,
Defendant.

MOTION TO SUPPRESS EVIDENCE, SUPPRESS STATEMENTS, QUASH WARRANT AND REQUEST FOR PRETRIAL EVIDENTIARY HEARING

Comes now the defendant, Zola M. Blair, by and through her counsel undersigned, and hereby moves this Court, pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constituion, and Sections 10, 15, 18(a) and 19 of Article I of the Constitution of the State of Missouri, and Section 541.296 RSMo (1978), to suppress from the use in evidence in the trial of the above-captioned case the following evidence, to-wit:

1) Palm prints seized from the person of the defendant on February 5, 1982 without a search warrant

and while defendant was being illegally detained and was under arrest without probable cause or other lawful authority, for the homicide alleged in the above-captioned case;

2) Any statements allegedly made by defendant to officers of the Kansas City, Missouri Police Department, whether oral or written, inculpatory or exculpatory, while being illegally detained and under arrest without probable cause, or other lawful authority, on February 5 and 6, 1982, for the homicide alleged in the above-captioned case;

3) An arrest warrant obtained by the officers of the Kansas City, Missouri Police Department on February 8, 1982, and attached hereto as Exhibit #1, such warrant having been obtained on the basis of the illegal search of defendant's person on February 5, 1982, and as the direct "fruit" of said illegal search;

4) Any statements allegedly made by defendant to officers of the Kansas City, Missouri Police Department, whether oral or written, inculpatory or exculpatory, after having been illegally arrested pursuant to the invalid arrest warrant, such warrant and any statements by defendant subsequent to the execution of said warrant being the "fruit" of the illegal search conducted by the Kansas City, Missouri Police Department on February 5, 1982, and alleged above in Paragraph No. 1).

In support of this motion, defendant more specifically states the following:

1. That on November 24, 1982, one Carl Lindstedt was found floating in a lake in Swope Park, and the Kansas

City, Missouri Police Department began their investigation classifying said investigation as a homicide;

2. That during their ongoing investigation, the police had one latent palm print that had previously been recovered from Lindstedt's truck which had not been identified following its comparison to the known palm prints of approximately thirty (30) individuals, including the palm prints of Lindstedt and his family;

3. That Zola M. Blair, defendant herein, was never considered a suspect by the police prior to January 22, 1982, and the police had no indication whatsoever that Zola Blair was in any way connected to any possible offense concerning Mr. Lindstedt;

4. That on January 22, 1982, one Kevin Pose, an investigator in the Jackson County Prosecuting Attorney's Office, received a telephone call from a woman who identified herself as the Mrs. Reverend Taylor. In said telephone call, Taylor indicated to Pose that she suspected the "Blairs" had killed a man in Swope Park based on what she had heard from a third, unnamed individual;

5. That on January 22, 1982, Pose delivered to the Kansas City, Missouri Police Department the tape of the conversation Pose had with Taylor. In said tape, Pose never relates to Taylor that their conversation is being recorded;

6. That, based upon this tape, Detective Dan Cline of the Kansas City, Missouri Police Department, Homicide Unit, requested on January 22, 1982 that the unidentified palm print recovered from the Lindstedt truck be compared to the known finger and palm prints of some members of the Blair family;

7. That on January 23, 1982, Detective Don Lauffer of the Kansas City, Missouri Police Department, Homicide Unit, requested that the unidentified palm print be compared to the prints of Warnetta Blair, James Blair, Darrell Blair and defendant herein, Zola Blair;

8. That on January 26, 1982, the Latent Print Section of the Kansas City, Missouri Police Department, Mr. Richard Schweiterman, reported:

a. That the unidentified palm print did not match the prints of Warnetta, James or Darrell Blair, and

b. That the Department did not have on file the finger or palm prints of defendant herein, Zola M. Blair;

9. That on January 28, 1982, Detective Don Lauffer issued a metropolitan area-wide request that defendant, Zola M. Blair, be "picked up" for this ongoing homicide investigation;

10. That on February 5, 1982, Officer Bob Thomas of the Kansas City, Missouri Police Department, assigned to the Metro Patrol Station located at 1880 East 63rd Street, arrested Zola M. Blair, defendant, at her home located at 4331 Forest, Kansas City, Missouri. Officer Thomas placed defendant under arrest for this homicide alleged against her in the above-captioned case. In addition, Officer Thomas arrested defendant on the pretext that there existed an outstanding municipal court warrant for a parking violation. However, this latter arrest was a "sham" in order that defendant could be brought to the Homicide Unit for booking and interrogation. The arrest, search and seizure of defendant at her home for

homicide was done without probable cause, or without the authority of an arrest or search warrant for homicide, and thus violated the Fourth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 15 of Article I of the Constitution of the State of Missouri. Further, said arrest, search and seizure violates Section 542.296.5(1) and (5), RSMo 1978;

11. That, subsequent to the search, seizure and arrest of defendant on February 5, 1982, defendant was transported directly to police headquarters, 1125 Locust, Homicide Unit, where she was again advised she was under arrest for the homicide alleged herein; further, defendant was "booked" at that time. During the booking, defendant's finger and palm prints were searched for and seized, without a search warrant or probable cause to believe she had committed an offense, in further contravention of her rights under the Fourth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 15 of Article I of the Constitution of the State of Missouri, and Section 542.296.5(1) and (5), RSMo 1978;

12. That, following the violations described above, and as the "fruit" thereof, defendant was interrogated by Detective Dan Cline of the Homicide Unit regarding the ongoing investigation. Detective Cline obtained a statement from defendant as the result of mental or physical coercion and duress, and after exploiting the past violations of her rights described above, in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10, 15, 18(a) and 19 of Article I of the Missouri Constitution, including *inter alia*, her right to remain silent, right to counsel and right to due process of law;

13. That, after spending the night of February 5, 1982 in jail, and as a further exploitation of the violation of her rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, Sections 10 and 15 of Article I of the Missouri Constitution, and Section 542.296.5(1) and (5), RSMo 1978, defendant was again interrogated on February 6, 1982. As she had done on February 5, 1982, defendant again denied any knowledge of any homicide regarding Carl Lindstedt. Later that day, defendant was released;

14. That subsequent to interrogating defendant on February 5, 1982, Detective Dan Cline requested that the unidentified palm print recovered from the Lindstedt truck be compared to the palm print of defendant, Zola M. Blair, which had been seized from her that day, as described in Paragraph No. 11, supra;

15. That on February 6, 1982, after being interrogated and again denying any knowledge of a homicide, defendant, Zola M. Blair, was released from police custody;

16. That on February 8, 1982, the Latent Print Section of the Kansas City, Missouri Police Department reported that the unidentified palm print recovered from the Lindstedt truck had been matched to the palm print recovered from Zola M. Blair on February 5, 1982, as described in Paragraph No. 11, supra;

17. That on February 8, 1982, subsequent to receiving the information of the matched palm prints described in Paragraph No. 16, supra, Detective Jacob Lightfoot of the Homicide Unit of the Kansas City, Missouri Police Department swore out a complaint against the defendant herein, Zola M. Blair, attaching to it a "statement of probable cause" which alleges the following, *inter alia*:

On 2-5-82 Zola M. Blair was arrested and interrogated regarding this homicide. She denied any knowledge or participation. Her fingerprints were obtained and she was released, pending further investigation.

On 2-8-82 Zola M. Blair's prints were compared against the unidentified print obtained from the victim's truck. A positive identification was made.

Pursuant to the filing of this complaint, and the attached statement of probable cause, at 4:37 p.m. on February 8, 1982, Associate Circuit Judge, the Honorable Leonard S. Hughes, entered his order, dated February 8, 1982, that a warrant for the arrest of defendant, Zola M. Blair, be issued. Said warrant was issued at 4:50 p.m. on February 8, 1982, being issued totally upon the basis that the defendant's palm prints matched the palm print recovered from the Lindstedt truck. Thus, this warrant is tainted as the "fruit" of the illegal and unconstitutional seizure of defendant's palm prints as described more fully in Paragraph No. 11, supra. *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 S.Ct. 182 (1920); *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407 (1963); *Alderman v. United States,* 394 U.S. 165, 89 S.Ct. 961 (1969). See Exhibits No. 1, 2, 3 and 4, attached hereto and incorporated herein by reference;

18. That, at 5:30 p.m. on February 8, 1982, numerous officers of the Kansas City, Missouri Police Department went to the home of the defendant, Zola M. Blair, at 4331 Forest, and arrested defendant for the homicide alleged against her in the above-captioned case, said arrest being made pursuant to the arrest warrant described above, issued forty (40) minutes earlier; the arrest of the defendant on February 8, 1982, pursuant to the warrant described in Paragraph No. 17, supra, was in further exploitation of the violation of her rights described in Paragraphs No. 10, 11 and 12, supra, and violated the Fourth and Fourteenth Amendments to the United States Constitution, as well as Sections 10 and 15 of Article I of the Missouri Constitution, and Section 542.296.5(1) and (5), RSMo 1978;

19. That at 5:58 p.m. on February 8, 1982, in further exploitation of the violation of defendant's rights described in Paragraph No. 18, supra, defendant was "booked" for the homicide alleged against her herein. Any printing of defendant's finger or palm prints at that time would be the "fruit" of the past violations of defendant's rights described in Paragraphs No. 10, 11, 12, 17 and 18, supra;

20. That at 6:15 p.m. on February 8, 1982, defendant was interrogated, once again, regarding the ongoing investigation of the Lindstedt homicide. After being interrogated for four (4) hours, defendant signed a written confession admitting complicity in the Lindstedt homicide. This written inculpatory statement should be suppressed for the following reasons:

a. That prior to signing said statement, defendant was coerced to waive her rights to remain silent by threats of the interrogating officer;

b. That said statement was obtained from defendant while she was under great mental strain due to the ongoing violation of her constitutional rights;

c. That said statement was involuntary and given without defendant having knowingly and intelligently waived her right to remain silent because defendant was under the influence of drugs;

d. That said statement was the "fruit" of an arrest pursuant to an illegal and invalid warrant for her arrest, as described more fully in Paragraph No. 17, supra, when said warrant had been executed by her arrest in her home only forty-five (45) minutes prior to the commencement of a four (4) hour interrogation, all in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Sections 10 and 15 of Article I of the Missouri Constitution, and Section 542.296.5(1) and (5), RSMo 1978;

e. That said statement was coerced from defendant while she did not have the benefit of counsel, and without having waived this right, both in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10, 18(a) and 19 of Article I of the Missouri Constitution.

WHEREFORE, defendant prays this Court to grant an evidentiary hearing on this motion and, at the conclusion of said hearing, to:

1) Suppress from the use in evidence at trial the palm prints recovered from defendant on February 5, 1982;

2) Suppress from the use in evidence at trial any statements made by defendant, whether written or oral, on February 5, 1982;

3) Quash the arrest warrant issued by the Associate Circuit Court on February 8, 1982;

4) Suppress from the use in evidence at trial any statements made by defendant, whether oral or written, on February 8, 1982, to officers of the

Kansas City, Missouri Police Department, as described above.

Defendant prays the Court for this relief, and for any other relief the Court deems appropriate, for all the reasons as stated herein.

Respectfully submitted,

/s/ Joseph H. Locascio
Joseph H. Locascio (#29078)
Special Public Defender
415 East Twelfth Street, 4 M-West
Kansas City, Missouri 64106
816/881-3420

A copy of the above and foregoing was duly delivered to the Office of the Prosecuting Attorney, Attn Mr. Robert Dakopolos, 415 E. 12th St., Kansas City, Mo., this 23rd day of June, 1983.

/s/ F. Burdick

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

NO. CR83-2231
Docket .....
DIVISION Nine

STATE OF MISSOURI,
Plaintiff,

vs.

ZOLA BLAIR,
Defendant.

ORDER

APPEARANCES

1. State by Ass't. Pros. Atty. .....
2. Defendant in Person and by Atty. .....

Defendant's Motion to Dismiss filed May 31, 1983 is OVERRULED.

Defendant's Motion to Suppress Evidence, Suppress Statements and Quash Warrant filed June 23, 1983 is SUSTAINED. The following evidence will be suppressed from the use in evidence at trial:

1. The palm prints recovered from defendant on February 5, 1982.
2. Any statements made by defendant, whether written or oral, on February 5, 1982 to Officers of the Kansas City Missouri Police Department.

3. Any statements made by defendant, whether oral or written, on February 8, 1982 to Officers of the Kansas City Missouri Police Department. The arrest warrant issued by the Associate Circuit Court on February 8, 1982 is hereby QUASHED.

/s/ H. Michael Coburn
Judge

October 13, 1983
DATE

Copies mailed 10-13, 1983 to:
Bob Dakopolos and Joe Locascio

/s/ S. McKelvy
Division Clerk

PETITIONER'S

BRIEF

(4)

No. 85-303

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MISSOURI,
Petitioner,

vs.

ZOLA BLAIR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT, EN BANC

BRIEF FOR PETITIONER

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Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

52 pp

QUESTIONS PRESENTED

1. Whether the respondent's otherwise lawful arrest, made pursuant to a valid arrest warrant for a municipal ordinance violation, may be considered "pretextual" and in violation of the Fourth Amendment solely because police suspected her of having committed a more serious offense (homicide) for which they arguably lacked probable cause to arrest, and hoped that her arrest would result in the discovery of evidence linking her to the homicide?

2. Whether, assuming the illegality of the initial arrest, evidence obtained subsequent to that arrest must be excluded from evidence, where the arresting officers acted in good faith, and had no reason to believe that their actions would be found to violate the Fourth Amendment?

3. Whether, assuming the illegality of the initial arrest *and* a lack of good faith on the part of the arresting officers, the fingerprint evidence must be subect to exclusion, where, because of the existence of the arrest warrant and the inevitability of the respondent's arrest under that warrant, such evidence would have been inevitably discovered, notwithstanding the alleged illegal actions of police?

4. Whether, assuming the illegality of the initial arrest, the statements made by the respondent to police three days later, following her rearrest for homicide under a second warrant, must be suppressed from evidence where the statements were acts of free will unaffected by any illegality in the detention?

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Cases

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OPINIONS BELOW

The opinion of the Missouri Supreme Court, *en banc*, which was issued on May 29, 1985, and which affirmed the trial court's suppression of the arrest warrant, fingerprints and confession in the case styled *State of Missouri v. Zola Blair*, No. 66,352, is reported at *State v. Blair*, 691 S.W.2d 259 (Mo. banc 1985). It also has been reprinted in its entirety at pages A1 through A18 of the Appendix to the State of Missouri's petition for a writ of certiorari.

An earlier opinion of the Missouri Court of Appeals, Western District, filed on July 3, 1984, in case No. WD 35,622, which was vacated when the Missouri Supreme Court granted the State's request for transfer of this case, and which therefore will not be published, has been reprinted in its entirety at pages A19 through A28 of the Appendix to the State's petition for a writ of certiorari.

The order of October 13, 1983, by the Honorable H. Michael Coburn, Judge of Division No. 9 of the Circuit Court of Jackson County, Missouri, 16th Judicial Circuit, granting the respondent's motion to suppress in case No. CR83-2231, will not be published, and has been reprinted in its entirety at pages 14-15 of the Joint Appendix.

JURISDICTIONAL STATEMENT

The opinion of the Missouri Supreme Court, *en banc*, affirming the trial court's suppression of the arrest warrant, fingerprints and a confession on the ground that the arrest was "pretextual" and in violation of the Fourth Amendment of the United States Constitution, was filed on May 29, 1985, and became final on June 25, 1985, when the court denied the State's motion for rehearing.

The State of Missouri's petition for a writ of certiorari was timely filed and docketed with this Court on August 22, 1985, within 60 days of the date the judgment became final, as required by 28 U.S.C. § 2101(d) and Rule 20.01 of this Court. The State's petition for a writ of certiorari was granted by this Court on January 13, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides, in its entirety, as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No person * * * shall be compelled in any criminal case to be a witness against himself, * * *.

STATEMENT OF THE CASE

A. Procedural History

On February 19, 1982, the respondent, Zola Mae Blair, was charged by an indictment returned by a grand jury in Jackson County, Missouri, 16th Judicial Circuit, in

case No. CR82-0724, with murder in the first degree, in violation of § 565.003, RSMo 1978 (Add. to Supp. L.F. 1). The indictment charged, in pertinent part, that on or about November 24, 1981, the respondent unlawfully killed one Carl Lindstedt "by shooting and striking him", and that the killing had been committed during the course of a robbery in which the respondent and others forcibly stole property from the possession of Lindstedt (Add. to Supp. L.F. 1).

On September 28, 1982, the respondent, through her court-appointed attorney, Joseph H. Locascio, Special Public Defender for the 16th Judicial Circuit, filed a motion to suppress the respondent's statements to police on the grounds that they were the product of an unlawful arrest (Supp. L.F. 8). The respondent's counsel filed an amended motion to suppress on February 16, 1983, which sought the suppression of (1) palm prints taken from the respondent following her arrest on February 5, 1982; (2) an arrest warrant for the homicide of Lindstedt issued on February 8, 1982; and (3) any statements made by the respondent to police at either the time of her initial arrest on February 5th, or on February 8th, when she was rearrested on the homicide warrant (Add. to Supp. L.F. 3-10). Essentially, the amended motion alleged that the respondent's original arrest was unlawful because it was made without probable cause, and the second arrest was tainted by evidence wrongfully seized by police during her initial arrest (Add. to Supp. L.F. 3-10).

On March 17, 1983, an evidentiary hearing on the respondent's motion was held before the Honorable Julian M. Levitt, Judge of Division No. 17 of the Jackson County Circuit Court (Tr. 1-96). At the conclusion of the hearing, Judge Levitt took the respondent's motion to suppress

under advisement, pending the receipt of briefs from the parties. However, prior to any ruling on the respondent's motion, the State voluntarily dismissed the indictment against the respondent, without prejudice (Supp. L.F. 18).

A new indictment was issued on May 13, 1983, in case No. CR83-2231, again charging the respondent with first-degree murder in the death of Lindstedt (Joint Appendix 2-3). This indictment was similar to the original, dismissed indictment, but added the allegations that, in addition to shooting and striking Lindstedt, she caused him "to die by drowning", and that the respondent and others forcibly stole "household furniture" from their victim (Joint Appendix 2-3).

On June 23, 1983, the respondent's counsel filed a motion to suppress evidence, realleging the grounds contained in his earlier motions (Joint Appendix 4-13). The parties stipulated that the issue concerning the legality of the respondent's arrest could be determined on the basis of the record made before Judge Levitt on March 17, 1983, in case No. CR82-0724 (Supp. L.F. 19). On October 13, 1983, the Honorable H. Michael Coburn, Judge of Division No. 9 of the Jackson County Circuit Court, entered an order sustaining the respondent's motion to suppress, and quashed the palm prints taken from the respondent's person and all statements made to police following both arrests (Joint Appendix 14-15). The order contained no findings of fact or conclusions of law, and contained no reasons for the court's ruling (Joint Appendix 14-15).

The State appealed from this ruling pursuant to § 547.200.1, RSMo Supp. 1984, to the Missouri Court of Appeals, Western District, which, on July 3, 1984, in an

unpublished opinion, affirmed the ruling of the trial court (Joint Appendix A19). However, this opinion was vacated on October 9, 1984, by the Missouri Supreme Court, and the case was transferred to that court for determination. On May 29, 1985, the Missouri Supreme Court, in a 4-to-3 decision, affirmed the trial court's ruling suppressing the evidence. *State v. Blair*, 691 S.W.2d 259 (Mo. banc 1985).

Following an unsuccessful motion for rehearing, which was denied by the Missouri Supreme Court on June 25, 1985, the State sought this Court's writ of certiorari pursuant to 28 U.S.C. § 1257(3). That petition was granted by this Court on January 13, 1986.

B. Statement of Facts

On November 11, 1981, Kansas City, Missouri, police discovered the body of 59-year-old Carl J. Lindstedt near Swope Memorial Drive and Gregory Boulevard, in Jackson County, Missouri (Def. Exh. 12). The victim had been bound hand and foot with duct tape, blindfolded, and had received a gunshot wound to the right shoulder and a large laceration to the back of his head (Def. Exh. 12A). The cause of death, however, later was determined to be drowning (Def. Exh. 12A).

The victim's 1977 Ford pickup was found abandoned approximately one-fourth of a mile east of where the body was recovered (Def. Exh. 12A). Subsequent investigation revealed a sofa and other household items had been removed from the victim's truck (Def. Exh. A). An unidentified palm print was discovered on a metal column behind the passenger door of the victim's truck (Def. Exh. A).

On January 22, 1982, Kevin Pose, an investigator with the Jackson County prosecutor's office, received a

telephone call from a person who identified herself as Mrs. Reverend Taylor (Def. Exh. 20). The woman told Pose that the Blairs, James, Warnetta and "Macy", *i.e.*, the respondent, had killed a man in Swope Park. According to Mrs. Taylor, the Blairs bragged to a young woman who lived near the Blairs that the victim was a "big man" who was "fighting for his life" and that they had thrown the body "in the lake or lagoon out there" (Def. Exh. 20). Mrs. Taylor described how the Blairs routinely stored stolen property at their residence, and told Pose that the Blairs had been involved in other homicides (Def. Exh. 20).

Pose made a transcript of his tape-recorded conversation with Mrs. Taylor and turned it over to Dan Cline, a detective with the Kansas City, Missouri, police department (Tr. 49-52). Three days after Mrs. Taylor's conversation with Pose, the police observed what appeared to be a custom-made sofa, belonging to Lindstedt, inside the residence of James Blair at 3932 Wayne in Kansas City (Def. Exh. 12A). A search warrant was obtained, and the victim's sofa, together with other property taken from him in the robbery, was found inside the house, which was unoccupied but which contained numerous personal papers belonging to James Blair (Def. Exh. 12A).

On the day following the receipt of the transcript of the telephone conversation between Pose and Mrs. Taylor, Detective Donald Lauffer requested a "latent print comparison", seeking to compare the palm print found in Lindstedt's truck with the known fingerprints of the respondent, along with Warnetta, James and Darrell Blair (Tr. 5; Def. Exh. 1). The police discovered that the respondent's fingerprints were not on file (Def. Exh. 1) and therefore issued an "arrest want" or "pickup order"

on January 28, 1982, for the respondent in connection with the Lindstedt homicide (Def. Exh. 2). A comparison of the fingerprints of Warnetta, James and Darrell Blair with the palm print found in the victim's truck failed to produce a match (Tr. 13).

Detective Lauffer explained during his testimony at the hearing on the respondent's motion to suppress that "pickup orders" are issued when the police believe that a person has knowledge of a crime, and need to talk to that person, but are unable to locate him (Tr. 6). Detective Lauffer said he was never requested to seek a search warrant for the palm prints of the respondent, and didn't remember ever being asked to seek an arrest warrant for her (Tr. 6).

Ralph M. Stewart, a patrolman with the Kansas City police department, testified that at approximately 3 p.m. on February 5, 1982, he and another officer, Bob Thomas, made a "residence check" at the home of the respondent's mother at 4331 Forest in connection with an illegally parked vehicle, and upon checking the address discovered that it was listed as the residence of the respondent who, they knew, was " 'wanted on a Kansas City, Missouri parking warrant 03258431' " (Tr. 21-23, 33-34, 41-42). Officer Stewart testified that he arrested the respondent "for an outstanding city warrant and also asked her to accompany us with regards to a pickup order issued by the crimes against persons unit" (Tr. 23).

Officer Stewart emphasized that the police "did not arrest her for a homicide" but rather merely "asked" her to accompany them to the police station concerning the homicide, for which there was no arrest warrant, only a "pickup order" (Tr. 23). When shown Officer Thomas's police report, which stated in the right-hand corner: "In-

vestigation Arrest, Criminal Homicide", Officer Stewart reiterated that the respondent was arrested for "an outstanding city warrant violation" and that "[s]he wasn't arrested at the scene for criminal homicide" (Tr. 25).

Officer Thomas's arrest report indicated that the arresting officers first learned that an arrest warrant was outstanding in connection with "KCMO parking warrant # 03258431" and that a "further check" disclosed the existence of the pickup order for the Lindstedt homicide (Def. Exh. 3). The report stated that a "Sgt. Watts" of the homicide unit was notified of both the arrest and "the KCMO city warrant" (Def. Exh. 3).

Records of the Kansas City Municipal Court revealed that on November 10, 1981, the respondent's green two-door Pontiac had been ticketed by police for parking on a city street with license plates registered to another vehicle, in violation of city ordinance 34.276 (Supp. L.F. 5). When the respondent failed to pay the fine for this violation or appear in court, a bench warrant was issued on January 8, 1982, by the Honorable James F. Carl, Judge of Division 203 of the Kansas City Municipal Court, in case No. 3258431 (Supp. L.F. 1, 4, 6).

At the time of her arrest on February 5th, the respondent was read her Miranda rights (Tr. 25-26) and was transported to police headquarters downtown, first to the homicide unit and then to the detention unit, where she was booked for homicide and also ordered held for "WSU", referring to the Warrant Service Unit of the police department, which handles the disposition of persons arrested on municipal warrants (Tr. 25-35; Def. Exh. 4).

Officer Stewart testified that he accompanied the respondent to the detention unit, where he instructed the

personnel there to book her for homicide with respect to complaint No. R81013 (Tr. 34) and then turn her over to the warrant service unit "in regards to the city warrant violation (Tr. 35). Notwithstanding the existence of the city arrest warrant and the absence of a warrant for the homicide, Officer Stewart explained that the respondent was taken to the homicide unit first because he believed that the state charge took precedence over a municipal warrant (Tr. 37).

As part of the booking process, city jail personnel took a full set of fingerprints from the respondent, including her palm prints (Tr. 45-48). Normally, when an individual is booked solely on the basis of a municipal court parking warrant, police are required to fill out a municipal court booking record (form "85PD"), which lists the name of the person arrested, the location of the arrest, the charge for which the warrant was issued, the bond amount and the court date (Tr. 30). An inked impression of the right index finger of the person arrested is normally all that is taken (Tr. 31), although occasionally the police request the detention unit personnel to take "a full set of prints on the person arrested" (Tr. 46).

After being booked and fingerprinted in connection with the homicide at 3:40 p.m. on the day of her arrest, the respondent was questioned by Dan Cline, a Kansas City homicide detective, at 4:10 p.m. in connection with the Lindstedt homicide (Tr. 54-55). The respondent denied any connection with the murder (Tr. 56). Although she admitted being present at the residence of her brother, James Blair, at 3932 Wayne, on the day the police recovered Lindstedt's couch, she stated that she hadn't lived there for several months and believed that the sofa had belonged to her brother (Def. Exh. 8).

She acknowledged that James had informed her that the police were looking for her in connection with Lindstedt's murder, and stated that she did not turn herself in because she figured the police would arrest her sooner or later (Def. Exh. 8). She denied helping her brother move the stolen sofa into his residence, refused to take a polygraph examination and then stated that she had nothing further to say to police (Def. Exh. 8). The interrogation then terminated at 5:15 p.m. (Def. Exh. 8).

On the morning of the following day, the police again attempted to question the respondent in connection with the murder of Lindstedt, but she again asserted that "she knew nothing about the homicide", the stolen couch or the other property of the victim that was recovered at her brother's house (Def. Exh. 22). After telling the police that she had nothing further to say about the investigation, she was turned over to the warrant service unit at 10:45 a.m. (Def. Exh. 22).

The respondent then was booked in connection with the municipal parking warrant, an inked impression of her right index finger was taken, and she was released at 12:55 p.m. after posting a $50 bond (Def. Exh. 12, 13).

On February 8, 1982, Detective Cline was informed by Richard Schwieterman, a certified latent print examiner employed by the Kansas City police department, that the palm prints taken from the respondent matched the palm print found in Lindstedt's truck (Tr. 18, 58). This information was furnished to Detective Jacob Lightfoot, who prepared and signed an affidavit and a complaint seeking an arrest warrant for the respondent in connection with Lindstedt's murder (Def. Exh. 12A, 12B).

That day an arrest warrant was issued by the Honorable Leonard S. Hughes, III, an associate judge of the

Jackson County Circuit Court (Def. Exh. 12C, 12D). Armed with the warrant, Detective Cline returned to the respondent's home at 4331 Forest, and the respondent was taken into custody at 5:30 p.m. (Tr. 59-60). She was booked for the Lindstedt homicide at 5:58 p.m. (Tr. 60-61) and a second set of fingerprints and palm prints were taken from her (Def. Exh. 19). She then was questioned by Detective Cline concerning her involvement in the murder (Tr. 60-61).

At first, she again attempted to deny participation in the crime (Tr. 61-64). However, she eventually admitted that, together with her brother, James, and a friend named David Hodison, she had been involved in the crime (Def. Exh. 14). She said she lured the victim to 55th and Cleveland by promising him sex in exchange for $30, and that James and Hodison overpowered Lindstedt and tied him up (Def. Exh. 14). They then unloaded the furniture that was in the back of Lindstedt's truck and placed it in a van (Def. Exh. 14).

According to the respondent's statement, they instructed her to drive to the lagoon in Swope Park in Lindstedt's truck, with Lindstedt still tied and bound in the front seat (Def. Exh. 14). James and Hodison followed in the van (Def. Exh. 14). When they arrived at their destination, the respondent said, James and Hodison pulled Lindstedt out of his truck and told the respondent to drive the truck up the street a short distance. She then heard two shots and observed that Lindstedt was lying face down in the lagoon and appeared to be dead (Def. Exh. 14). She said they then took the stolen furniture over to her brother's residence at 3932 Wayne, and that she helped them unload it (Def. Exh. 14).

On March 12, 1982, the respondent pleaded guilty to the municipal ordinance charge of parking a vehicle that displayed license plates registered to another car, and was sentenced to pay a $15 fine (Supp. L.F. 4, 6).

SUMMARY OF ARGUMENT

The respondent's arrest on an outstanding, pre-existing arrest warrant for a municipal parking violation, justified her custodial arrest and the taking of a full set of fingerprints incident to that arrest, and the arrest and subsequent search were not rendered "pretextual" and therefore in violation of the Fourth Amendment simply because the police also wished to question her about an unrelated homicide and take her fingerprints so that they could be compared to a palm print found at the scene of the homicide.

The decision of the Missouri Supreme Court essentially holds that an objectively lawful arrest, made pursuant to a valid warrant, can somehow be transformed into an invalid arrest merely because of the subjective intent of the arresting officers. Such reasoning has repeatedly been rejected by this Court, most recently in *Scott v. United States,* 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978), *United States v. Villamonte-Marquez,* 462 U.S. 579, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983), and *Maryland v. Macon,* 472 U.S. ....., 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985).

Furthermore, even if the initial arrest of the respondent could be characterized as "pretextual" solely because of the motives of the arresting officers, the evidence obtained by police subsequent to her arrest was nevertheless admissible, and for at least three reasons:

First, the evidence was admissible under the "good faith" exception to the exclusionary rule, as applied by this Court in cases such as *United States v. Leon,* 468 U.S. ....., 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and *United States v. Peltier,* 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), since the arresting officers could reasonably have assumed, in view of this Court's precedents and the Missouri case of *State v. Hunter,* 625 S.W.2d 682 (Mo. App., E.D. 1981), that their actions in arresting the respondent on the municipal warrant, and taking her fingerprints incident to that arrest, did not offend the Fourth Amendment.

Second, the fingerprint evidence, at least, was admissible under the "inevitable discovery" exception to the exclusionary rule articulated in *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), since, because of the existence of the outstanding arrest warrant, it must be presumed that the respondent ultimately would have been arrested pursuant to that warrant, and that the police, knowing that they needed to compare her fingerprints to the palm print found in the murder victim's truck, would then have taken her fingerprints incident to that arrest.

Finally, even if the respondent's initial arrest was invalid, the incriminating statements she made to police three days later, following her rearrest under an arrest warrant for homicide, were not the "poisonous fruit" of her original arrest, and therefore are not subject to suppression. Under this Court's decisions in *Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), and *Rawlings v. Kentucky,* 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), which rejected a "but for" approach in determining the admissibility of a confession that follows an illegal arrest, her statements were admissible in any event, since they were not tainted by the alleged antecedent illegality.

ARGUMENT

I.

The respondent was validly arrested pursuant to an arrest warrant issued for a municipal parking violation, and was lawfully fingerprinted as an incident of that custodial arrest, and the arrest did not become "pretextual" and therefore invalid simply because the police also wished to question her about her participation in a homicide and planned to use her fingerprints to further their investigation into that crime.

The principal issue presented by this case is relatively simple and straightforward: Is an otherwise valid custodial arrest, made pursuant to an arrest warrant for a municipal ordinance violation, rendered "pretextual" and therefore in violation of the Fourth Amendment, simply because the police suspect that the arrestee has been involved in a more serious offense, for which they lack probable cause to arrest, and hope the arrest will further their investigation into the more serious crime?

Or, to put it another way, is a person immunized from arrest for a relatively minor offense, for which the police have probable cause or a warrant to arrest, merely because the police also wish to obtain evidence from him concerning a more serious crime, for which no warrant or probable cause to arrest exists?

However the question is phrased, the answer would seem obvious: Where the police possess a warrant or probable cause to make a custodial arrest, the arrest and

any evidence obtained during a search incident to that arrest do not become mysteriously transformed, by some inexplicable process of reverse alchemy, into an invalid "pretextual" arrest and its "poisonous fruit", simply because of the subjective motivations of the arresting officers.

Obvious, perhaps, to most. But not to the majority of the Missouri Supreme Court, which, in a 4-to-3 decision, upheld the suppression of fingerprints and a confession obtained from the respondent on the ground that they were the "poisonous fruit" of an unlawful, "pretextual" arrest, even though she had been lawfully arrested on the basis of an arrest warrant for an outstanding municipal parking violation. *State v. Blair,* 691 S.W.2d 259 (Mo. banc 1985).

To be sure, the police were more interested in determining the extent of the respondent's involvement in the death of 59-year-old Carl Lindstedt than they were in making her answer for the municipal parking violation. On December 22, 1982, a little more than two months after Lindstedt's body was discovered in a Kansas City park, a woman who identified herself as "Mrs. Reverend Taylor" informed an investigator with the Jackson County Prosecutor's Office that James, Warnetta and "Macy" Blair[1] had been involved in the Lindstedt killing (Def. Exh. 20).

Three days after they learned of this conversation, the police observed what appeared to be a sofa, stolen from Lindstedt at the time of his murder, inside the residence of the respondent's brother, James Blair (Def. Exh. 12A). A search warrant was obtained, and the victim's couch,

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1. The respondent was known to use the alias "Macy" or "Macey", presumably derived from her middle name, Mae (Def. Exh. 18).

together with other property taken from him during his abduction, was found inside the house (Def. Exh. A).

The police, apparently believing—perhaps mistakenly—that they still lacked probable cause to arrest the respondent for the Lindstedt homicide, did not immediately seek an arrest warrant for her arrest on a charge of murder, but rather issued a "pickup order" for her apprehension in connection with the crime, knowing that an arrest warrant had been issued several weeks earlier because of her failure to appear in Kansas City municipal court on an illegal parking violation (Def. Exh. 2; Supp. L.F. 1, 4-6).

On February 5, 1982, the respondent was taken into custody by Kansas City police on the authority of both the arrest warrant for the parking violation and the "pickup order" for the homicide (Tr. 21-25, 33-34, 41-42; Def. Exh. 3). She was first taken to the homicide unit, where she was fingerprinted, and questioned about the Lindstedt homicide (Tr. 54-56). The respondent denied any involvement in the killing (Tr. 56; Def. Exh. 8). On the following day, when she continued to deny having any knowledge of the homicide (Def. Exh. 22), she was booked in connection with the parking violation and released from custody after posting bond (Def. Exh. 12, 13, 22).

However, after a comparison of her fingerprints, obtained during her arrest on February 5th, revealed that they matched the previously unidentified palm print found in the truck of the homicide victim, another warrant for the respondent's arrest was obtained, this time for the Lindstedt homicide, and the appellant was rearrested on February 8, 1982 (Tr. 18, 58-61; Def. Exh. 12A-12D). Ultimately, the respondent admitted her involvement in

the kidnapping and robbery of Lindstedt, although she insisted that her brother, James Blair, and an individual named David Hodison had done the actual killing (Def. Exh. 14).

After the trial court ordered the suppression of the respondent's fingerprints and her statements to police, the Missouri Supreme Court affirmed that ruling, holding that "[t]he execution of the parking violation warrant was but a subterfuge or pretext, not pursued,[2] to gather evidence of the unrelated crime of homicide." *State v. Blair, supra,* 691 S.W.2d at 263[6]. The court then added:

> "Because the illegally seized evidence provided the sole basis for the arrest warrant for homicide of February 8, 1982,[3] and led directly to respondent's statements on that day, the warrant and statement are also inadmissible as 'fruits of the poisonous tree.'"

State v. Blair, id.

However, the conclusions reached by the Missouri Supreme Court simply cannot be squared with any of the previous decisions of this Court. Quite simply, since the arrest warrant for the municipal ordinance charge predated the police's suspicions concerning the respondent's involvement in the Lindstedt homicide, an arrest pursuant to that warrant cannot be characterized as "pre-

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2. This assertion is contrary to the record. The undisputed evidence showed that the respondent was, in fact, booked by police on the municipal ordinance charge (Def. Exhs. 12, 13, 22), and, on March 12, 1982, pleaded guilty to that charge and was sentenced to pay a $15 fine (Supp. L.F. 4, 6).

3. Not true. The affidavit of probable cause executed by Detective Jacob Lightfoot in support of the arrest warrant also stated that the police had obtained information on January 22, 1982, that the appellant was one of the suspects, and that the police, on January 25, 1982, had recovered the homicide victim's sofa at the residence of James Blair (Def. Exh. 12A).

textual" merely because the police believed that an arrest on the city charge would produce evidence facilitating their investigation of the homicide.

The Missouri Supreme Court appeared to place considerable reliance upon this Court's decision in *Hayes v. Florida,* 470 U.S. ....., 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985), which reaffirmed its earlier holding in *Davis v. Mississippi,* 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), and held that absent consent, probable cause or a warrant, the investigative detention of an individual at a police station for fingerprinting purposes violated the Fourth Amendment. This Court in *Hayes* concluded that a Fourth Amendment violation occurs "when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes." *Hayes v. Florida, supra,* 105 S.Ct. at 1647[2].

This rule, however, does not resolve the question presented by this case, where it is undisputed that the police *did* have a warrant for the respondent's arrest. It should be noted that the validity of that warrant has never been challenged by the respondent, and, in view of this Court's holding in *Shadwick v. City of Tampa,* 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 783 (1972), upholding the validity of such warrants, any such challenge would be futile.

Likewise, the right of the police to make a full-custody arrest of the respondent, on the basis of this warrant, also has not been disputed. It is clear, in any event, that the police are lawfully entitled to make a custodial arrest based on even minor municipal ordinance violations, *Michigan v. DeFillippo,* 443 U.S. 31, 99 S.Ct.

2627, 61 L.Ed.2d 343 (1979), including offenses involving the violation of motor vehicle regulations. *United States v. Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Gustafson v. Florida,* 414 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973). Moreover, this Court's opinions in *Davis* and *Hayes* infer, and many other cases expressly hold, that a person who is validly arrested may be subject to fingerprinting, without further judicial authorization. *Hendricks v. Swenson,* 456 F.2d 503, 505[6] (8th Cir. 1972); *Smith v. United States,* 117 U.S.App.D.C. 1, 324 F.2d 879, 882[3] (1963), *cert. denied,* 377 U.S. 954 (1964); *United States v. Krapf,* 285 F.2d 647, 650-651 [4-6] (3rd Cir. 1961); *United States v. Kelly,* 55 F.2d 67, 70 (2nd Cir. 1932).[4]

The question then becomes whether an otherwise valid custodial arrest and a search incident to that arrest become "pretextual" and therefore constitutionally infirm simply because of the subjective motivations of the arresting officers? A negative answer to this question would appear to be compelled by this Court's opinion in *Scott v. United States,* 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978), where it was held that, in determining the existence of a constitutional violation, the officer's conduct must be viewed against an objective standard, without regard to the underlying intent or motivation of the officers involved.

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4. Although the Kansas City police normally take only an inked impression of the right index finger of a person booked on an arrest warrant for a municipal parking violation (Tr. 31), the fact that the police took a full set of fingerprints from the respondent is of no constitutional significance, *Gustafson v. Florida, supra,* 414 U.S. at 265-266, 94 S.Ct. at 491-492[2], since the police had the right to take a full set of fingerprints, and occasionally exercised that right in other instances (Tr. 46). *See also United States v. Robinson, supra,* 414 U.S. at 221-222 n. 2, 94 S.Ct. at 471 n. 2.

In *Scott*, the defendant challenged the admissibility of intercepted telephone conversations, ostensibly authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. The pertinent portion of that act (18 U.S.C. § 2518(5) (1976)) required that any wiretapping or electronic surveillance "be conducted in such a way as to minimize" the interception of communications not otherwise subject to interception under that act. The defendant in *Scott* argued that the government's admitted failure to make a good-faith effort to comply with the minimalization requirement of the act required the suppression of all of the intercepted communications, even if the government's conduct was objectively reasonable.

The government contended in *Scott* that this argument failed to distinguish between what is necessary to establish a constitutional or statutory violation and what is necessary to support a suppression remedy once a violation has been established. While consideration of official motives might play some role in determining whether application of the exclusionary rule is appropriate *after* a statutory or constitutional violation has been established, the existence of such a violation "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time", and subjective intent alone cannot make otherwise lawful conduct illegal or unconstitutional. *Scott v. United States, supra,* 436 U.S. at 135-136, 98 S.Ct. at 1722-1723.

This Court in *Scott* held that "the Government's position . . . embodies the proper approach for evaluating compliance with the minimalization requirement", emphasizing that the Court's prior opinions, including *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968), and *United States v. Robinson, supra,* had evaluated alleged violations

of the Fourth Amendment by undertaking "an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Scott v. United States, supra,* 436 U.S. at 137-138, 98 S.Ct. at 1723[1]. This Court then reiterated that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.,* 436 U.S. at 138, 98 S.Ct. at 1723.

In *United States v. Villamonte-Marquez,* 462 U.S. 579, 584 n. 3, 103 S.Ct. 2573, 2577 n. 3, 77 L.Ed.2d 22 (1983), this Court had an occasion to reaffirm this principle. The central issue in *Villamonte-Marquez* was whether 19 U.S.C. § 1581(a) (1976), which authorized customs officers to board any vessel at any time and at any place in the United States to examine the vessel's manifest and other documents, violated the Fourth Amendment when customs officials, acting under the authority of this statute and without any suspicion of wrongdoing, board for the inspection of documents a vessel that is located in waters providing ready access to the open sea. *Id.,* 462 U.S. at 580-581, 103 S.Ct. at 2575.

The defendants, however, contended in the alternative, that because customs officers were accompanied by a Louisiana state policeman and were investigating an informant's tip that a vessel in the ship channel was thought to be carrying marijuana, they could not justifiably rely on the federal statute authorizing boarding for inspection of the vessel's documentation. *Id.,* 462 U.S. at 584 n. 3, 103 S.Ct. at 2577 n. 3. This Court, noting that "[t]his same line of reasoning" had been "rejected in a similar situation" in *Scott,* again refused to accept those arguments, reasoning that to hold otherwise would be to lead

to "the incongruous result" of allowing the boarding of ordinary, nonsuspicious vessels, but of forbidding them in the case of suspected smugglers. *Id.*, 462 U.S. at 584 n. 3, 103 S.Ct. at 2577 n. 3.

Most recently, in *Maryland v. Macon*, 472 U.S. ....., 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985), a case involving a prosecution for the distribution of obscene materials, the defendant alleged that what objectively appeared to be the purchase of the obscene materials by police was actually the equivalent of a warrantless search, since the officers later seized the marked $50 bill they had used to purchase the materials and failed to return the change. According to the defendant's argument, "[w]here the officer subjectively intend[ed] to retrieve the money while retaining the magazines, . . . , the purchase [wa]s tantamount to a warrantless seizure." *Id.*, 105 S.Ct. at 2783.

This Court held that such an argument could not "withstand scrutiny", explaining:

> "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' [citing *Scott*], and not on the officer's actual state of mind at the time the challenged action was taken. [citing *Scott*]. Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence."

Maryland v. Macon, supra, 105 S.Ct. at 2783[6].

Lower federal courts, both before and after *Scott*, have uniformly held that the question of the investigating officers' intent or motive becomes, in the words of this Court in *Scott*, "relevant only after it has been determined that the Constitution was in fact violated." *Scott v. United States, supra*, 436 U.S. at 139 n. 13, 98 S.Ct. at 1724 n. 13. Thus, for example, in *United States v. Bugarin-Casas*, 484 F.2d 853, 854 n. 1 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974), a case cited in *Scott*, it was held that the fact that border patrol agents intended to stop the defendant's car in any event did "not render the search, supported by independent probable cause, invalid".

In *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980), an airline passenger, suspected by DEA agents of possessing drugs because he met a "drug-courier profile", was arrested for violating a Georgia statute that made it a misdemeanor to give a false name to a law enforcement officer. A search incident to that arrest disclosed the presence of cocaine in the passenger's suitcase. The defendant complained on appeal that his arrest for violating the state statute was "a pretext arrest" and that this allegedly illegal arrest tainted the subsequent search. *Id.*, 629 F.2d at 1156 n. 5. The Fifth Circuit disagreed, holding that "[t]he fact that the DEA agents suspected [the defendant] of criminal conduct other than that for which he was lawfully arrested, [wa]s irrelevant to the legality of that arrest" and that the failure to charge the defendant with the state violation was not "significant." *Id.*, 629 F.2d at 1156 n. 5.

Similarly, in cases both pre-dating and post-dating *Villamonte-Marquez*, it consistently has been held that otherwise lawful Coast Guard document searches do not become "pretextual" simply "because the officer might in fact have been looking for drugs, not documents." *United States v. Kincaid*, 712 F.2d 1, 3-4[4] (1st Cir. 1983), and

cases cited therein. The same rationale has been applied in upholding inventory searches, *United States v. Bosby*, 675 F.2d 1174, 1179[4] (11th Cir. 1982), airport preboarding searches, *United States v. Smith*, 643 F.2d 942, 943-944[1-2] (2nd Cir. 1981), *cert. denied*, 454 U.S. 875 (1981), and consensual searches, *United States v. White*, 706 F.2d 806, 808[2] (7th Cir. 1973), notwithstanding the defendants' arguments that the searches were rendered invalid because of the officers' subjective intent. In each of these cases the court held, either expressly or implicitly, that the searches must be judged by a standard of objective reasonableness without regard to the investigating officers' motives or intent.

On the other hand, there is an absolute paucity of authority for the proposition that an otherwise valid arrest, made either under warrant or with probable cause, can be rendered invalid solely because of the arresting officers' subjective intent. Although this Court's decision in *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960), contains statements which, removed from their proper context, might seem to be supportive of a "subjective intent" theory, a careful reading of *Abel* shows that they are consistent with *Scott*, *Villamonte-Marquez* and *Macon*.

In *Abel*, agents of the F.B.I., who suspected the defendant of engaging in espionage, notified officers of the Immigration and Naturalization Service of their belief that the defendant was residing illegally in this country. Based on this information, the I.N.S. issued a warrant for the defendant's administrative arrest as a preliminary to his deportation. Subsequently, the defendant, in the presence of several F.B.I. agents, was arrested by agents of the I.N.S. on the administrative warrant and a search

of his room, conducted by the I.N.S. agents, uncovered evidence that later was used in the defendant's trial for espionage. *Abel v. United States, supra*, 362 U.S. at 221-224, 80 S.Ct. at 688-689. The defendant asserted on appeal that his arrest by the I.N.S. was but "a pretense and sham," and was merely designed to allow the F.B.I. to gather evidence to be used against him in a criminal prosecution for espionage. In response, this Court stated:

> "Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts."

Id., 362 U.S. at 266, 80 S.Ct. at 690[2].

This Court in *Abel* went on to state that "[w]hat the motive was of the I.N.S. officials who determined to arrest petitioner, and whether the I.N.S. in doing so was not exercising its powers in the lawful discharge of its own responsibilities but while serving as a tool for the F.B.I. in building a criminal prosecution against petitioner, were issues fully canvassed in both courts below" and that "[t]he crucial facts were found against the petitioner." *Id.*

These passages, by themselves, might suggest that if the real motive of the F.B.I. and I.N.S. was to use the administrative warrant procedure to secure evidence of possible espionage activities, the arrest and search incident to that arrest would be invalid and "pretextual", regardless of the objective basis for the issuance of the warrant. However, this Court's further discussion of the issues involved in the case dispels that possibility. This Court noted that only the I.N.S. is authorized to initiate deportation

proceedings, and that the F.B.I. was not required "to remain mute" regarding someone they had reason to believe was a deportable alien, merely because he is suspected of espionage and the F.B.I. "entertains the hope that criminal proceedings may eventually be brought against him." *Id.*, 362 U.S. at 228-229, 80 S.Ct. at 692. This Court further observed that the I.N.S. "would not have performed its responsibilities" if it had been deterred from instituting deportation proceedings solely because it became aware of the defendant through the F.B.I. and had knowledge that the F.B.I. suspected the defendant of espionage. There was nothing wrong, this Court stated, in the F.B.I. and I.N.S. cooperating in effecting the defendant's administrative arrest. This Court then stated:

> "Nor does it taint the administrative arrest that the F.B.I. solicited petitioner's cooperation before it took place, stood by while it did, and searched the vacated room after the arrest. The F.B.I. was not barred from continuing its investigation in the hope that it might result in a prosecution for espionage because the I.N.S., in the discharge of its duties, had embarked upon an independent decision to initiate proceedings for deportation."

Id., 362 U.S. at 229, 80 S.Ct. at 692.

Clearly, *Abel* can only be construed as holding that an administrative warrant, validly issued, does not become "pretextual" and therefore invalid, simply because the officers who execute that warrant also hope to find evidence of a criminal offense, for which the investigating officers lack proable cause to arrest.

On at least two occasions, this Court also has enunciated the rule that "[a]n arrest may not be used as a pre-

text to search for evidence", *United States v. Lefkowitz*, 285 U.S. 452, 467, 52 S.Ct. 420, 424[4], 76 L.Ed. 877 (1932), or that "an arrest may not be used merely as the pretext for a search without warrant". *Ker v. California*, 374 U.S. 23, 42, 83 S.Ct. 1623, 1635, 10 L.Ed.2d 726 (1963). But neither case can be read to hold that an otherwise valid arrest, made pursuant to a warrant or with probable cause, becomes "pretextual" solely because police are at least partially motivated by a desire to obtain evidence of a more serious, unrelated offense.

In *Lefkowitz*, where this Court upheld the suppression of evidence seized from the defendant's room at the time of his arrest, it is reasonably clear from the context of the opinion that the word "pretext" was not being used interchangeably with "subterfuge" or "sham", because government agents possessed a warrant for the defendant's arrest, and their search was related to the offense for which he was arrested, *i.e.*, violation of federal liquor laws. However, this Court in *Lefkowitz* held that the right to arrest the defendant did not justify a general exploratory search of the room in which the arrest occurred, and therefore the arrest could not be used as an excuse or "pretext" to carry out a search of unlimited scope.

In *Ker*, this Court's statement that "an arrest may not be used merely as the pretext for a search without warrant" was made in the context of considering the defendant's claim that the seizure of marijuana, discovered in plain view while the police were making a valid arrest in the defendant's apartment, was the result of an illegal search. *Ker v. California, supra*, 374 U.S. at 42-43, 83 S.Ct. at 1634-1635. This Court simply held that the discovery of the marijuana "did not constitute a search, since the officer merely saw what was placed before him in full view." *Id.*, 374 U.S. at 43, 83 S.Ct. at 1635.

Many of the cases that reiterate the principle articulated in *Lefkowitz* and *Ker* that an arrest may not be used as a "pretext to search for evidence", involve fact patterns similar or identical to the facts found to exist in *Lefkowitz* and unsuccessfully alleged to exist by the defendant in *Ker*—a valid arrest, but an overbroad, exploratory search of the place where the arrest occurred. *See McKnight v. United States,* 87 U.S.App.D.C. 151, 183 F.2d 977, 978[3-4] (1950); *Carlo v. United States,* 286 F.2d 841, 846[4] (2nd Cir. 1961); *United States v. Harris,* 321 F.2d 739, 741[2-3] (6th Cir. 1963). These cases simply stand for the rather obvious proposition that "[t]he mere fact that the arrest was not unlawful does not give law enforcement officers carte blanche to rummage about at will in any home or any other place where an arrest is made and then seek to justify their conduct by a blanket statement that the 'search' made by them was incidental to an arrest." *Carlo v. United States, supra,* 286 F.2d 846[4].

That principle, while obviously sound, bears little relevance to the present case, where it is the validity of the arrest, rather than the scope of the search, that is at issue. As heretofore noted, if the police had probable cause to make a custodial arrest of the respondent, it was permissible, as an incident of that arrest, to take her fingerprints.

Also, numerous cases have held, consistent with the Missouri Supreme Court's decision in *State v. Moody,* 443 S.W.2d 802, 804[3] (Mo. 1969), that if an "arrest for a traffic violation is used as a *pretext* for conducting [a] search, the proceeds of the search incident thereto will be inadmissible." *Id.,* 443 S.W.2d at 804 (court's emphasis). However, such cases are clearly distinguishable and

altogether dissimilar from the facts of the present case, and generally have involved either of two situations: (1) cases where the traffic arrest was valid, but the search was overbroad and unrelated to the offense for which the defendant was arrested;[5] and (2) cases where the court found that the arrest was actually a "pretext", *i.e.,* without probable cause to believe the defendant had committed *any* offense.[6]

None of the cases in category (1) is in point, if only because the present appeal does not involve an overbroad search incident to a valid arrest. Moreover, the authority of these cases is questionable, since most are based on the now-discredited proposition that an arrest for a traffic violation cannot support a search of the arrestee or the passenger compartment of the automobile he was driving. *See Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); *United States v. Robinson, supra.*

More pertinent to the issue presented by this appeal, are the cases in category (2), which, like *State v. Moody,*

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5. *See Riddlehoover v. State,* 198 So.2d 651 (Fla.App. 1967); *People v. Molarius,* 146 Cal.App.2d 129, 303 P.2d 350 (1956); *People v. Mayo,* 19 Ill.2d 136, 166 N.E.2d 440 (1960); *Lane v. Commonwealth,* 386 S.W.2d 743 (Ky. 1964); *People v. Lee,* 371 Mich. 563, 124 N.W.2d 736 (1963); *State v. Michaels,* 60 Wash.2d 638, 374 P.2d 989 (1962); *State v. Cuellar,* 25 Conn.Supp. 229, 200 A.2d 729 (1964); *Elliott v. State,* 173 Tenn. 203, 116 S.W.2d 1009 (1938).

6. *See State v. Lawson,* 256 La. 471, 236 So.2d 804 (1970); *Saltsman v. State,* 95 Okla.Crim. 228, 243 P.2d 737 (1972); *Fields v. State,* 463 P.2d 1000 (Okla.Crim. 1970); *Holland v. State,* 93 Okla.Crim. 180, 226 P.2d 448 (1951); *Johnson v. State,* 92 Okla.Crim. 63, 220 P.2d 469 (1950); *Banker v. State,* 61 Okla. Crim. 169, 66 P.2d 955 (1937); *Collins v. State,* 65 So.2d 61 (Fla. 1953); *Graham v. State,* 60 So.2d 186 (Fla. 1952); *Coston v. State,* 252 Miss. 257, 172 So.2d 764 (1965); *State v. Riggins,* 64 Wash.2d 881, 395 P.2d 85 (1964); *Hall v. State,* 488 S.W.2d 788 (Tex.Crim. 1973); *State v. Lahr,* 560 P.2d 527 (Mont. 1972); *State of Montana v. Tomich,* 332 F.2d 987 (9th Cir. 1964).

supra, and *State v. McCarthy*, 452 S.W.2d 211 (Mo. 1970), have used the term "pretextual arrest" to mean an arrest made without probable cause to believe the defendant has committed even a traffic offense. Since the arrests were found to be invalid, the searches conducted incident to those arrests were properly deemed to have been unlawful as well.

However, where it is clear that the police had a valid reason to make an arrest for a traffic violation, and the search of the defendant's person or his automobile was reasonably related to that arrest, the arrests and resultant searches have consistently been upheld, even where the police have had an ulterior motive for stopping the defendant. *See Speake v. Grantham*, 317 F.Supp. 1253, 1267-1268 (S.D. Miss. 1970); *Shackelford v. State*, 473 P.2d 330, 332[1] (Okla.Crim. 1970); *State v. Holmes*, 256 So.2d 32, 33-34[1] (Fla.App. 1971); *Musgrove v. State*, 1 Md.App. 540, 232 A.2d 272, 276-277[9-11] (1967); *Braxton v. State*, 234 Md. 1, 197 A.2d 841, 844[5] (App. 1964); *Urquhart v. State*, 261 So.2d 535, 536[1-2] (Fla.App. 1971).

In each of these cases, the defendant was suspected by police of a felony, but the police lacked probable cause or even "articulable suspicion" under *Terry v. Ohio, supra*, to make a valid arrest or a brief stop to investigate their suspicions. Instead, each of the defendants was arrested for a misdemeanor traffic offense, allegedly committed in the officers' presence, and a search incident to that arrest resulted in the discovery of evidence implicating the defendants in the suspected felonies. Nevertheless, in each case the court refused to suppress the evidence despite the defendant's claim that the misdemeanor arrest was merely a "pretext" to search for evidence of the suspected felony.

State v. Holmes, supra, best illustrates the rationale employed by the courts in rejecting the defendants' "pretextual arrest" claims in these cases. *In Holmes*, a detective, responding to a reported break ng and entering, saw a car going "too fast for conditions," sliding around a corner and being driven with its lights out. A chase ensued, and the driver (Holmes) and the other occupants in the car were charged with possession of burglars' tools, which were visible in the backseat of the vehicle. Holmes also was charged with careless driving and the possession of a firearm by a felon. *Id.*, 256 So.2d at 32-33. The defendant challenged his arrest and seizure of the burglars' tools, arguing that the traffic arrest was merely a "pretext" to stop his vehicle.

In overruling this contention, the court in *Holmes* extensively discussed the concept of "pretextual" arrests; essentially, the court held that the rule which prohibits a traffic arrest from being used as a "pretext" to search for evidence, applies only where it is clear that "the arrest is one which would not have been made but for the motive of the arresting officer" and that "the person under suspicion acquires no immunity from seizure which would be denied the unsuspected citizen." *State v. Holmes, supra*, 256 So.2d at 33-34[1].

In the instant case, it is clear that the motives of the arresting officers were irrelevant in determining the legality of the respondent's arrest pursuant to the parking warrant. The respondent "acquire[d] no immunity from seizure", *State v. Holmes, supra*, 256 So.2d at 34, on the parking warrant simply because police suspected her of some involvement in the Lindstedt homicide. Certainly, the respondent, sooner or later, would have been apprehended in connection with the parking warrant, so the

respondent's arrest was not "one which would not have been made but for the motive of the arresting officer," although the police's suspicions concerning her involvement in the homicide undoubtedly hastened her arrest.

The Missouri Supreme Court attempted to distinguish *Holmes* and cases similar to it on the ground that each presented "a situation where the defendant commits an offense in the presence of the officers, who then immediately arrest and search incident thereto." *State v. Blair, supra,* 691 S.W.2d at 263. But any distinction between these cases and the facts of the present case is not favorable to the respondent, since the existence of the arrest warrant, which predated the police's investigation of her role in the homicide, enhanced the reliability of her arrest, and eliminated the possibility, at least arguably present in *Holmes* and like cases, that the arrest would not have been made except for the desire of the arresting officers to obtain evidence of the more serious offense.

If the decision of the Missouri Supreme Court is allowed to stand, it would be the first case where an otherwise lawful arrest, made pursuant to a valid, pre-existing arrest warrant, was held unlawful simply because of the subjective intent of the arresting officers.[7] Moreover, its effect would be to immunize from arrest those parking

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7. Neither *United States v. Prim,* 698 F.2d 972 (9th Cir. 1983), nor *United States v. Millio,* 588 F.Supp. 45 (W.D. N.Y. 1984), cited by the Missouri Supreme Court, *id.,* 691 S.W.2d at 262, hold to the contrary, since a close reading of the opinions reveals that, in *Prim,* Judge Hug concurred in the 2-to-1 decision only because he believed that the arrest was invalid because the DEA agents "did not have federal statutory authority" to arrest on the outstanding state nonsupport warrant, *id.,* 698 F.2d at 978, and, in *Millio,* the court held that the municipal "scofflaw" that supposedly served as the authority to detain the defendant only "prevent[ed] the renewal of the car's registration until the [parking] fines were paid", and did not justify the repossession of the defendant's automobile. *Id.,* 588 F.Supp. at 47.

violators who are suspected of serious crimes, while allowing the arrest of all other nonsuspicious violators.

Moreover, it could easily be extended to any situation where the police have probable cause or a warrant to arrest an individual on a less serious offense, and suspect (but lack probable cause to believe) that he might be involved in a more serious crime, and subjectively hope that his arrest on the lesser offense will further their investigation into the more serious crime. For example, suppose the police have a warrant or probable cause to believe that the defendant has been involved in a burglary, and also have a suspicion (not arising to the level of probable cause) that he has been involved in an unrelated homicide, and wish to compare the defendant's fingerprints with the murder weapon found at the crime scene. According to the Missouri Supreme Court's reasoning in the present case, the subjective intent of the arresting officers would undermine the validity of an otherwise valid burglary arrest, and, in effect, would immunize the defendant from arrest for the burglary.

This is foolishness. It is also contrary to this Court's opinions in *Scott, Villamonte-Marquez, Macon* and others, all of which have consistently applied an objective test in determining the validity of an arrest, regardless of the subjective intent of the arresting officers. If the law were otherwise, and the subjective intent of the officers could convert an objectively valid arrest into a Fourth Amendment violation, the reverse would also be true, and an objectively invalid arrest could be transmuted into a lawful seizure merely because the arresting officers subjectively believed, however erroneously, that their actions were lawful.

That, too, would make little sense.

Since the police, pursuant to the pre-existing arrest warrant for the municipal parking violation, had the lawful authority to make a custodial arrest of the respondent, and to take a full set of her fingerprints incident to that arrest, the fact that the police subjectively hoped that the arrest would further their investigation into the Lindstedt homicide did not make the otherwise valid arrest "pretextual", or require the suppression of evidence lawfully obtained incident to that valid arrest.[8]

II.

Even assuming the respondent's otherwise legal arrest was somehow rendered "pretextual" by the subjective intent of the arresting officers, there was no justification for suppressing the evidence obtained by police subsequent to the arrest, because (1) the police acted in good faith in arresting the respondent on the basis of the municipal arrest warrant; (2) the evidence would have been inevitably discovered at some point, in view of the existence of the warrant; and (3) the respondent's incriminating statements were not tainted by her original arrest.

As emphasized in considerable detail under Point I, *supra*, the otherwise valid arrest of the respondent on the

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8. Although, assuming the police lacked probable cause to also arrest the respondent for the Lindstedt homicide, the police erred in preventing the respondent from immediately posting bond once she had been booked and fingerprinted, such extended detention, even if unlawful, has no bearing on the resolution of this case, since the taking of the respondent's fingerprints was not the "poisonous fruit" of the overnight detention or police questioning.

basis of the municipal arrest warrant was not mystically converted into an unlawful arrest merely because the police also hoped that the arrest would aid their investigation into the Lindstedt homicide. However, even if this Court were to hold for the first time that the subjective intent of the arresting officers could vitiate an objectively valid arrest, it would not necessarily require the suppression of the evidence obtained by police (*i.e.*, her fingerprints and incriminating statements) subsequent to her arrest.

A. "Good Faith" Exception

In the courts below, the State of Missouri consistently argued that, even if the respondent's arrest was ultimately declared to be unlawful because of the subjective intent of the arresting officers, the application of the exclusionary rule was nevertheless inappropriate because the arresting officers acted in obvious good faith in taking the respondent into custody on the municipal arrest warrant.

This Court, in *United States v. Leon,* 468 U.S. ....., 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and *Massachusetts v. Sheppard,* 468 U.S. ....., 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), permitted the prosecution to use in its case-in-chief evidence obtained by officers in reasonable reliance on search warrants issued by detached and neutral magistrates which were later determined to be invalid, in *Leon* because the warrant was unsupported by probable cause, and in *Sheppard* because of a technical error on the part of the issuing judge. Since the exclusionary rule is designed to deter unlawful police conduct, this Court concluded that no purpose is served by excluding evidence obtained by police conduct that was "objectively

reasonable". *United States v. Leon, supra,* 104 S.Ct. at 3423[4]; *Massachusetts v. Sheppard, supra,* 104 S.Ct. at 3428[1].

In reaching such a conclusion this Court relied in part on *Michigan v. DeFillippo,* 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979), and *United States v. Peltier,* 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), where it had refused to suppress evidence obtained incident to an arrest or search made in good-faith reliance on a statute that was later declared to be unconstitutional. In *Peltier,* this Court emphasized:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

United States v. Peltier, supra, 422 U.S. at 542, 95 S.Ct. at 2320.

While recognizing the existence of a "good-faith" exception to the exclusionary rule, the Missouri Supreme Court refused to apply it to the present case on the ground that "all of the evidence support[ed] a conclusion that the officers acted in bad faith without a search warrant." *State v. Blair,* 691 S.W.2d at 264. Such a statement finds no support in the record, and is simply based on the erroneous assumption that since it was clear that the police were primarily (albeit not exclusively) motivated in arresting the respondent by their desire to obtain her fingerprints and question her concerning the Lindstedt homicide, they were necessarily acting in bad faith.

But the real question, of course, is whether the police "had knowledge, or may properly be charged with knowledge" that their conduct was unconstitutional under the Fourth Amendment. *United States v. Peltier, id.* As repeatedly emphasized under Point I of this brief, this Court has consistently held that the subjective intent of the arresting officers does not render unconstitutional an arrest or search that is objectively reasonable. In other words, an objectively valid arrest, made pursuant to a warrant, has never heretofore been ruled invalid simply because the police hoped that the arrest would lead to the discovery of incriminating evidence connecting the arrestee to a more serious offense. So the police could reasonably have assumed that the respondent's arrest would not be considered unlawful simply because they also knew that it would afford them an opportunity to take her fingerprints and question her concerning her possible involvement in the homicide.

In fact, in view of the decision of the Eastern District of the Missouri Court of Appeals in *State v. Hunter,* 625 S.W.2d 682 (Mo.App., E.D. 1981), apparently sanctioning the same type of police conduct involved in the present case, the police who ordered the respondent's arrest would have had no way of even suspecting that their actions violated the Fourth Amendment. In *Hunter,* the defendant was arrested on the basis of three outstanding municipal arrest warrants by Wellston, Missouri, police at the request of a federal postal inspector, who "wanted to talk to defendant with respect to a stolen check." *Id.,* 625 S.W.2d at 683. The defendant was fingerprinted, questioned and then released.

Four months later, the defendant was charged with forgery in state court, and he convinced the trial court

to suppress his fingerprints on the ground that they " 'were not taken in conjunction with the arrest but were an independent action of the federal officer who had no probable cause to have taken [them] at that particular time.' " *Id.*, 625 S.W.2d at 683. However, the trial court allowed the State to refingerprint the defendant subsequent to his arrest on the state forgery charge, and this ruling was upheld by the Court of Appeals. *Id.*, 625 S.W.2d at 683-684.

In denying the defendant's challenge to the use of the second set of fingerprints, the court, although expressly refusing to decide this point, suggested in a footnote that since the defendant was "in [the] lawful custody of the Wellston [p]olice" based on the municipal arrest warrants, "[t]his permitted the lawful taking of defendant's fingerprints as a matter of routine police procedure." *State v. Hunter, supra,* 625 S.W.2d at 683 n. 1.

The obvious conclusions that may be drawn from this opinion, decided more than two months prior to the respondent's arrest, are (1) the arrest was "lawful" and not "pretextual", even though it was at least partially motivated by a request from a postal inspector to obtain evidence of criminal activity unrelated to the municipal warrants; and (2) it was not improper to take the defendant's fingerprints incident to that arrest, even though it is clear that the postal inspector wanted to compare the defendant's fingerprints with those found on the stolen check under investigation.

Yet, despite the existence of the *Hunter* decision and the nonexistence of any authority to the contrary, the Missouri Supreme Court held that the police acted in "bad faith" by conducting their investigation in a manner that they could only reasonably have assumed was lawful.

The unnecessary and unjustified result of that ruling, of course, will be to prevent the prosecution's use "of inherently trustworthy tangible evidence", *United States v. Leon, supra,* 104 S.Ct. at 3412, evidence which is not only "reliable" but which also is "the most probative information bearing on the guilt or innocence of the [respondent]." *Stone v. Powell,* 428 U.S. 465, 490, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

B. "Inevitable Discovery" Doctrine

Another basis for denying the suppression of the respondent's fingerprints, even if it were to be assumed that the respondent's arrest was unlawful, is the "inevitable discovery" exception of *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984), which holds that the "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to the integrity or fairness of a criminal trial", *id.*, 104 S.Ct. at 2510, and that "if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury". *Id.*, 104 S.Ct. at 2511.

The Missouri Supreme Court summarily disposed of the State's "inevitable discovery" claim by simply asserting that it was "without merit" because the State purportedly failed to prove by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered by lawful means. *State v. Blair, supra,* 691 S.W.2d at 263-264. In doing so, the court chose to ignore the obvious: Since it is undisputed that there existed a valid warrant for the respondent's arrest for the municipal parking violation, and since it is clear that,

incident to the arrest, the police could lawfully take a full set of her fingerprints without further judicial authorization, it is apparent that, even if the police had not immediately arrested the respondent on the outstanding warrant, it must be presumed that the arrest warrant would have been served upon the respondent at some point, and a full set of her fingerprints then would have been obtained.

It is possible that the Missouri Supreme Court chose to ignore this rather obvious truth simply because it illustrates the folly of the court's substantive holding, invalidating the respondent's arrest solely because the police arrested her *immediately* once they learned of the municipal warrant. Presumably, if the police had made no effort to treat the respondent any differently from other persons who were named in such warrants, and had simply waited until the officers who normally serve those warrants got around to apprehending her, and *then* had taken her fingerprints incident to that arrest, no Fourth Amendment violation would have occurred.

This is, of course, nonsensical. In any event, since the respondent would ultimately have been arrested on the warrant, and since the police knew that they wished to compare her fingerprints to the palm print found in the murder victim's truck, they would have taken her fingerprints incident to that arrest, whenever it occurred. Accordingly, under this Court's decision in *Nix v. Williams, supra,* it is clear that the fingerprint evidence would have been inevitably discovered by police, and therefore was not subject to suppression even if the respondent's original arrest could accurately be characterized as "pretextual".

C. Brown v. Illinois "Taint" Issue

Furthermore, even assuming, for the sake of argument, that the respondent's original arrest was "pretextual" and therefore constitutionally infirm, it does not automatically follow that her statements to police, made three days after her initial arrest, were subject to exclusion as the product of the earlier, allegedly unlawful detention.

The Missouri Supreme Court concluded that "[b]ecause the illegally seized evidence provided the sole basis for the arrest warrant for homicide of February 8, 1982, and led directly to respondent's statements on that day, the warrant and statement, are also inadmissible as 'fruits of the poisonous tree' ", quoting *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). *State v. Blair, supra,* 691 S.W.2d at 263.

This statement is incorrect for at least two reasons. To begin with, as noted under footnote 3, *supra,* the affidavit of probable cause executed by Detective Lightfoot in support of the arrest warrant also stated (1) that the police had obtained information on January 2, 1982, that the appellant was one of the suspects, and (2) that the police, on January 25, 1982, had recovered the homicide victim's sofa at the residence of the respondent's brother, James Blair (Def. Exh. 12A). It is well settled that, when an affidavit in support of a search warrant contains information which is in part unlawfully obtained, the validity of the warrant and search depend on whether the untainted information, considered by itself, establishes probable cause for the warrant to issue. *See United States v. Marchand,* 564 F.2d 983 (2nd Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978), and cases collected at 992-995.

Secondly, in holding the respondent's statements inadmissible, the Missouri Supreme Court failed to take into consideration this Court's decisions in *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), and *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). It is well settled that a confession made by a defendant subsequent to an illegal arrest is not inadmissible *per se;* exclusion of the respondent's statements was not required "unless [her] statements were the result of [her] illegal detention." *Rawlings v. Kentucky, supra,* 448 U.S. at 106, 100 S.Ct. at 2562[4].

In *Brown v. Illinois, supra,* 422 U.S. at 603, 95 S.Ct. at 2261, this Court rejected a "but for" approach to the admissibility of such statements, since "persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality." In determining whether a confession was obtained by the exploitation of an illegal arrest, the giving of *Miranda* warnings is "an important factor"; also to be considered is the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. *Brown v. Illinois, supra,* 422 U.S. at 603-604, 95 S.Ct. at 2261-2262; *Rawlings v. Kentucky, supra,* 448 U.S. at 107, 100 S.Ct. at 2562.

Although the Missouri Supreme Court did not undertake the inquiry required by *Brown* and *Rawlings*, there exists, as in *Brown* and *Rawlings*, " 'a record of amply sufficient detail and depth from which the determination may be made.' " *Rawlings v. Kentucky, supra,* 448 U.S. at 107, 100 S.Ct. at 2562.

First, it is undisputed that the respondent received *Miranda* warnings on at least three occasions prior to

making her incriminating statements, a consideration which is "important although not dispositive in determining whether the statements in issue were obtained by exploitation of an illegal detention." *Rawlings v. Kentucky, supra,* 448 U.S. at 107, 100 S.Ct. at 2562.

Second, in examining the "temporal proximity of the arrest and the confession", it is significant that the respondent's incriminating statements were made three days after her initial, allegedly illegal, arrest. During the intervening period, the respondent was living at home with her mother. As for the existence of "intervening circumstances", an important consideration is that the respondent was rearrested pursuant to a court-issued arrest warrant which, unlike the warrant in *Taylor v. Alabama,* 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982), was not based solely on information obtained during the respondent's initial, purportedly unlawful arrest.

Brown and *Rawlings* also mandate the consideration of " 'the purpose and flagrancy of the official misconduct' ". *Rawlings v. Kentucky, supra,* 448 U.S. at 109, 100 S.Ct. at 2564. As emphasized in considerable detail under subsection A of this point, notwithstanding the unsupported assertion to the contrary by the Missouri Supreme Court in its opinion, the record in this case is devoid of any indication that the police had any reason to believe that their conduct violated the Fourth Amendment, given the existence of the valid arrest warrant authorizing the respondent's custodial arrest and the taking of her fingerprints incident to that arrest. As in *Rawlings v. Kentucky, supra,* 448 U.S. at 110, 100 S.Ct. at 2564, there is simply no evidence of "conscious or flagrant misconduct" by the police in this case.

Finally, while *Brown* requires that, pursuant to the Fifth Amendment, the voluntariness of the statement be established as a threshold requirement, the respondent, as in *Rawlings v. Kentucky, id.*, "has not argued here or in any other court that [her] admission[s] . . . [were] anything other than voluntary."

In this case, as in *Rawlings*, it is apparent that the State of Missouri "carried its burden of showing that [the respondent's] statements were acts of free will unaffected by any illegality in the initial detention", *Rawlings v. Kentucky, id.*, and the Missouri Supreme Court impliedly reached a contrary result simply by ignoring all of this Court's decisions on this issue since *Wong Sun*.

CONCLUSION

For the reasons advanced by the State of Missouri in this brief, as well as in its petition for a writ of certiorari previously filed with this Court, the opinion of the Missouri Supreme Court, *en banc*, upholding the trial court's suppression of the evidence against the respondent on the ground that her arrest was "pretextual" and therefore in violation of the Fourth Amendment, should be vacated, and the case remanded to the Missouri Supreme Court with directions that the respondent's motion to suppress be overruled.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 85-303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MISSOURI,

Petitioner,

v.

ZOLA M. BLAIR,

Respondent.

On Writ of Certiorari
To The Supreme Court Of Missouri

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Is it an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments for police to arrest and detain a person for homicide without probable cause or other lawful authority when authorization for a parking violation warrant on the person exists in a computer file?

2. Is it an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments for police to arrest a citizen on the pretext of executing an outstanding parking violation warrant when their primary purpose is to obtain custody of the person to conduct a warrantless search of her body and an interrogation pursuant to an investigation for homicide when no probable cause exists to believe she committed the homicide?

3. Is it an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments for police, without a warrant, to search for and seize an individual's palm impressions pursuant to a homicide investigation after the person has been arrested, "booked" and detained for the homicide without probable cause or other lawful authority but while also authority for an arrest warrant exists for the person in the computerized files for parking violation?

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Procedural History.

Zola M. Blair, respondent herein, was indicted in the Circuit Court of Jackson County, Missouri on February 19, 1982 with murder in Case No. CR82-0724 (Add. to S.L.F. 1).[1] On February 16, 1983, respondent filed an

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[1] "Add. to S.L.F." refers to respondent's Addendum to Supplemental Legal File; "S.L.F." refers to respondent's Supplemental Legal File; "L.F." refers to the Legal File herein. "Tr." refers to the transcript of the hearing held March 17, 1983 on respondent's Motion to Suppress (L.F. 6-13), and "Ex." refers to respondent's exhibits marked at that hearing, some of which were introduced into evidence.

amended motion to suppress her palm prints and statements to police, and to quash an arrest warrant, before the Honorable Julian M. Levitt in Division 17 of the Circuit Court (Add. to S.L.F. 3-10). The motion alleged, *inter alia*, that on February 5, 1982, police unlawfully and unconstitutionally arrested and detained respondent for homicide without a warrant or probable cause to believe she committed that offense (Add. to S.L.F. 5-6). Respondent alleged, further, that police also claimed to have arrested her for an oustanding parking violation warrant when, in fact, this representation was a "sham" masking an investigatory police desire to obtain custody of respondent to search her body and seize her palm prints and interrogate her for homicide. Violations of the Fourth and Fourteenth Amendments were alleged, as well as violations of Section 15 of Article I of the Missouri Constitution[2] and Mo.Rev.Stat. § 542.296 (1978).[3]

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[2] Section 15 of Article I of the Missouri Constitution, 1945, provides:

> That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.

[3] Mo.Rev.Stat. § 542.296 (1978) provides, in pertinent part:

> 1. A person aggrieved by an unlawful seizure made by an officer and against whom there is a pending criminal proceeding growing out of the subject matter of the seizure may file a motion to suppress the use in evidence of the property or matter seized.
>
> . . .
>
> 5. The motion to suppress may be based upon any one or more of the following grounds:
>
> (1) That the search and seizure were made without warrant and without lawful authority; . . .
>
> . . .
>
> (5) That in any other manner the search and seizure violated the rights of the movant under section 15 of article I of the constitution of Missouri, or the fourth and fourteenth amendments of the Constitution of the United States.
>
> 6. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. The burden of going forward with the evidence and the risk of nonpersuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled.

The motion to suppress was heard on March 17, 1983 before Judge Levitt in Division 17 of the Circuit Court at Independence (Tr.). At the conclusion of the hearing, the trial court asked for a prompt response from the parties to the issues raised in the motion to suppress before ruling on it (Tr. 95-96). On March 29, 1983, the State of Missouri filed suggestions in opposition to the motion and, the same day, requested a rehearing on the motion to demonstrate probable cause for the arrest and detention of respondent for homicide on February 5, 1982 (S.L.F. 1-3, 7). Over respondent's objections, the court granted the request and delayed ruling on the motion on April 28, 1983 (S.L.F. 8-11, 12). The rehearing was scheduled for May 13, 1983 (*Id.*). The state voluntarily dismissed the indictment (S.L.F. 18). Although the dismissal appears to have been signed on May 11, the judge to whom the dismissal was presented, the Honorable Donald Mason, Division 11 of the Circuit Court, did not sign the order discharging respondent until May 13, 1983, the day of the scheduled rehearing (*Id.*).

On that same day, May 13, respondent was re-indicted in CR83-2231 in the Circuit Court of Jackson County, Missouri with the identical offense, namely, the murder of Carl Lindstedt (L.F. 5).[4] On June 23, 1983, the case was

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[4] In Petitioner's Brief at 4, the State represents the new indictment to have added an allegation that the victim died "by drowning." This allegation was present in the original, dismissed indictment (Add. to S.L.F. 1, L.F. 5), and was not a clarification of the cause of death.

pending before Division 9 of the Circuit Court, the Honorable H. Michael Coburn. Respondent filed her identical motion to suppress palm prints and statements, and praying the arrest warrant for homicide be quashed (L.F. 6-13). The parties appeared before Judge Coburn and advised the court that the motion had been heard, briefed and argued in Division 17 of the Circuit Court (S.L.F. 19). The transcript of that hearing was to be utilized by Judge Coburn in ruling on the motion (*Id.*). Further, the trial court ordered the parties to advise of the need to adduce additional evidence on or before July 15, 1983. The order specified a rehearing would occur on July 21, 1983, should one be necessary (*Id.*).

No further hearings were held. On September 2, 1983, the parties stipulated that the record of the previous case, CR82-0724, be incorporated into the record of CR83-2231 (L.F. 14). Then, on October 13, 1983, the trial court entered its order sustaining the motion to suppress evidence and quashing the arrest warrant for homicide (J.A. 14-15).

On October 15, 1983, the State of Missouri appealed the pretrial ruling pursuant to Mo.Rev.Stat. § 547.200.1 (Supp. 1983) (eff. October 1, 1983). On July 3, 1984, the Missouri Court of Appeals, Western District, in an unpublished opinion, affirmed the ruling of the trial court (Pet. for Cert. A19-28).

On October 9, 1984, the Supreme Court of Missouri, en banc, entered its order transferring the cause to that court. On May 29, 1985, after briefs and arguments by the parties, the Supreme Court of Missouri announced its 4-3 opinion affirming the decision of the Court of Appeals, and that of the trial court (Pet. for Cert. A1-18). *State* v. *Blair*, 691 S.W.2d 259 (Mo. banc 1985).

On June 25, 1985, the Supreme Court of Missouri overruled petitioner's motion for rehearing (Pet. for Cert. at A41). On August 22, 1985, the State of Missouri petitioned this Court for its Writ of Certiorari pursuant to 28 U.S.C. § 1257(3). The petition was granted by the Court on January 13, 1986. *Missouri* v. *Blair*, ___ U.S. ___, 106 S.Ct. 784.

B. Statement Of Facts.

On November 24, 1981,[5] the Kansas City, Missouri police discovered a murder (Ex. 12A, Tr. 2, 49). The only solid evidence in the investigation consisted of a latent palm print from the victim's nearby truck (Tr. 53). During the course of the investigation, police failed to identify the person to whom the palm print belonged (Tr. 10-13).

On January 22, 1982, an informant implicated the Blair family in the murder.[6] Any time a name is mentioned in the course of an investigation and a possibility exists that the named individual could have been involved in the crime, a request is made that the individual's fingerprints,

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[5] Petitioner's Brief at 5 incorrectly states that the police discovered the victim's body on November 11, 1981. The Supreme Court of Missouri in its opinion correctly notes the body to have been discovered on November 24 of that year (Pet. for Cert. A2).

[6] Petitioner improperly refers to the transcript of the alleged conversation with the informant (Brief for Pet. 6, 15). Although reference was made to the transcript at the evidentiary hearing held March 17, 1983 (Tr. 51-53), and it has been filed by petitioner as an exhibit herein, it was neither offered nor received into evidence in either of the trial courts. Nor did the Court of Appeals or the Supreme Court of Missouri in any way appear to have relied upon it in reaching their decisions (Pet. for Cert. A2, A20). Reference to this exhibit by petitioner violates this Court's Rule 34.5, and therefore should not be considered.

if on file, be compared to any unidentified fingerprints from the crime scene (Tr. 53-54). Consistent with this practice, on January 23, 1982, a request was made by Detective Lauffer of the homicide unit that the "inked finger and/or palm impressions" of members of the Blair family be compared with any latent prints in the case (Tr. 4, Ex. 1, Tr. 2, 7). The only unidentified latent print existing in the investigation on January 23, 1982 was the latent palm impression (Tr. 12-13, Ex. 15, Tr. 10, 19).

On January 26, 1982,the fingerprint examiner filed a report indicating that the latent palm impression did not match three of the individuals to whom it was compared, but that the palm impressions of the fourth, respondent Zola Blair, were not in police files (Ex. 1, Tr. 13). The homicide unit discovered on January 27, 1982 that they did not have the palm prints of respondent (Tr. 14).

On January 28, 1982, Detective Lauffer of the homicide unit issued a "pick up" for respondent, ordering that she be apprehended for the homicide (Ex. 2, Tr. 2, 8).

On February 5, 1982, knowing of the "pick up" order, police officer Ralph Stewart went to respondent's home with police officer Thomas to arrest her for the homicide (Tr. 23, 43). The arrest report indicates that the officers checked respondent's home based upon an illegally parked car and, "[u]pon checking the address, [they] discovered [respondent] to be wanted on KCMo parking warrant #03258431" (Ex. 3, Tr. 2, 41, 43, 44). The same report indicates the officers arrested respondent for investigation, "criminal homicide" (*Id.*). Officer Stewart, however, testified he arrested respondent at her residence on an outstanding city warrant, although he did not possess the warrant (Tr. 23, 35). Officer Stewart advised respondent of her "Miranda rights," knowing she was

about to be interrogated for homicide (Tr. 26). Then, he forcefully transported respondent directly to the department's homicide unit (Ex. 3, Tr. 32, 44).

Upon arrival at the homicide unit, the officers obtained a "May-I" permission slip from the commander of the homicide unit authorizing respondent to be booked for homicide (Tr. 32-33). Respondent was brought to the detention unit, where she was booked for homicide (Tr. 33, Ex. 4, Tr. 2, 40). Stewart acknowledged, "at that point" respondent was under arrest for homicide (Tr. 32). Forty minutes elapsed between the officers' checking of respondent's residence and her being booked into the detention unit for homicide (Ex. 3, 4, Tr. 34). It is normal procedure in the police department to take finger and palm prints of a person booked for homicide (Tr. 56). On parking warrant arrests, booking involves the police taking only the right index finger impression (Tr. 31). This one finger impression is sufficient to identify an individual (Tr. 15).

Thirty minutes later, at 4:10 p.m. on February 5, 1982, Detective Dan Cline of the police department's homicide unit interrogated respondent for the homicide for which she had been arrested (Tr. 49-50, 55-56). During the interrogation, respondent denied any knowledge of the crime (Tr. 56).[7]

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[7] Petitioner improperly refers to Detective Cline's report concerning his February 5th interrogation of respondent (Brief for Pet. 9, 10). As in the case with Ex. 20, this report (Ex. 8) was referred to by Det. Cline at the March 17, 1983 evidentiary hearing (Tr. 55) and has been filed as an exhibit herein by petitioner. The exhibit, however, was neither offered nor received into evidence in either of the trial courts, and does not appear to have been considered by the Court of Appeals or the Supreme Court of Missouri (Pet. for Cert. A3, A22). Reference by petitioner to Ex. 8 violates this Court's Rule 34.5, and should not be considered. Respondent's statements to Det. Cline on February 5th are summarized in Ex. 12A (Tr. 2,49).

On the same day, February 5, 1982, knowing that respondent's palm prints had been taken in the jail pursuant to the booking for homicide, Detective Cline requested that the unidentified palm print existing in the homicide investigation be compared with respondent's palm prints, taken from her that day in the jail (Tr. 56-57, Ex. 7, Tr. 2, 19).

Respondent was detained the night of February 5, 1982 and, at approximately 8:08 a.m. the morning of February 6, 1982, she was checked out of the detention unit to the crimes against persons division by Detective Floyd Williams of the homicide unit (Ex. 22, Tr. 74). Respondent indicated to Detective Williams that she had no knowledge of the homicide for which she was being held (*Id.*). Approximately two and one-half hours later, at 10:45 a.m. on February 6, 1982, respondent was released from the homicide detention (*Id.*).

At 10:59 a.m. February 6, 1982, respondent was arrested and booked for the municipal parking warrant by officer D. Wesson at 1125 Locust, the detention unit of police headquarters (Ex. 10, Tr. 2, 32-33). This was respondent's first opportunity to post bond and be released pursuant to the parking violation, since an individual cannot post bond until booked on an offense (Tr. 32). Police procedure upon arresting an individual for an outstanding parking warrant is to take the person to a district station or the detention unit, whichever is nearer, verify the warrant, fill out a form 85PD listing the basic information of the person, the location of the arrest, the basis of the warrant, the bond amount, and the court date (Tr. 30, Ex. 5, Tr. 2, 35). In addition, the right index finger print of the arrestee is placed on the back of form 85PD (Tr. 31, Ex. 5 at 5). Normally, the individual is allowed to remain at the district station for four hours to post bond

(Tr. 31). The district station for respondent was on 63rd Street (Tr. 30). This procedure was apparently followed at 10:59 a.m., February 6, 1982, when respondent was arrested by officer Wesson (Ex. 10). She was not, however, at her district station, but at downtown headquarters at 1125 Locust (Ex. 22, 10). Her right index finger print was placed on the back of the booking record (Ex. 10, Tr. 38-39). Approximately two hours later, at 12:55 p.m., responded posted a fifty-dollar bond on the parking warrant and was released (Ex. 11, Tr. 2).

On February 8, 1982, Mr. Richard Schweiterman, the latent print examiner for the police department, reported to the homicide unit that the inked palm prints taken from respondent on February 5 matched the unidentified latent palm print existing in the homicide investigation (Ex. 7, Tr. 2, 18-19). On that date, February 8, 1982, Detective Jacob Lightfoot filed his complaint in the Associate Circuit Court of Jackson County, Missouri charging repondent with the murder of Carl Lindstedt (Ex. 12B, Tr. 2, 49). Along with the complaint, Detective Lightfoot attached a statement of probable cause swearing respondent to have been arrested and interrogated for the homicide on February 5, 1982 (Ex. 12A, Tr. 2, 49). He swore that her "fingerprints" had been obtained and they matched the unidentified print recovered from the victim's vehicle (*Id.*). Further, Detective Lightfoot alleged respondent to have stated she had no contact with the victim and had not been in or around his truck (*Id.*).

A warrant was issued for the arrest of respondent for homicide at 4:33 p.m. on February 8, 1982 (Tr. 59, Ex. 12D, Tr. 2, 49). At 5:30 p.m. on February 8, respondent was again arrested at her home (Tr. 60). At 5:58 p.m., respondent was again "booked" for homicide (Tr. 61). After being booked, respondent was again checked out of

the jail by Detective Cline and brought to the homicide unit, where she was given her "Miranda rights" and again interrogated for homicide (Tr. 61, Ex. 2, Tr. 64, 65). At first, respondent again denied any knowledge of the homicide. Detective Cline confronted respondent with the matching palm prints (Tr. 63-64). The detectives also showed respondent a picture of the victim's truck and asked how her palm prints were placed there; in response, respondent admitted knowing the victim and having seen him on that particular night (*Id.*). The interrogation culminated in a written confession (Ex. 14, Tr. 2, 72). The interrogation lasted approximately three and one-half hours, concluding at 10:45 p.m. on February 8, 1982 (Tr. 65).

SUMMARY OF ARGUMENT

Missouri courts agreed with respondent's factual contention that police arrested her on February 5, 1982 at her home for homocide. Police only learned of a parking warrant upon checking respondent's address, but did not possess the warrant. Missouri law governs the legality of arrest in the first instance. *Michigan* v. *DeFillippo*, 443 U.S. 31, 36, 99 S.Ct. 2627, 2631 (1979). Petitioner held burden in trial court to establish legality of arrest. On review, facts and reasonable inferences are stated favorably to order challenged on appeal, and reviewing court is free to disregard any contrary evidence and inferences. Under Missouri law, officers must possess a parking warrant to lawfully execute it. *Rustici* v. *Weidemeyer*, 673 S.W.2d 762 (Mo. banc 1984). They did not possess it. Courts below properly determined the arrest of respondent was for homicide, without probable cause or an arrest warrant, and this Court should defer to that determination of historical fact.

Seizure of repondent's inked palm prints pursuant to the homicide investigation was without a search warrant or probable cause to believe respondent committed homicide. The seizure occurred during and as the fruit of an unlawful detention for homicide, and were properly suppressed. *Davis* v. *Mississippi*, 394 U.S. 721, 89 S.Ct. 1394 (1969). Oral statements made within thirty minutes of respondent's unlawful detention were the "fruit" of that illegal arrest and detention and were properly suppressed. *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979).

Assuming, *arguendo*, police initially attempted to arrest respondent on a parking warrant, that claim is a pretext concealing a motive to arrest for the primary purpose of searching for and seizing respondent's inked palm impressions and interrogating her pursuant to a homicide investigation. No probable cause or reasonable suspicion existed to believe respondent committed homicide. An arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the Fourth and Fourteenth Amendments. Duplicitous search and seizure activity is unlawful under *United States* v. *Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420 (1932) and *Abel* v. *United States*,362 U.S. 217, 80 S.Ct. 683 (1960). The primary purpose of a search or seizure must comply with the Fourth Amendment. *Michigan* v. *Clifford*, 464 U.S. 287, 104 S.Ct. 641 (1984).

Overlooking the primary purpose of a search or seizure would reap such abuse, encourage such capricious searches and arrests, and engender such disrespect and resentment of law enforcement that this Court should not adopt such a position. Exceptions to the warrant requirement would be used as investigative tools instead of for the purpose they were created. Traffic offenses are easily

committed, authorizing arrests in most states. Searches of the person and automobile would follow automatically. Inventory searches of impounded vehicles would be used as investigative tools. The plain view doctrine would no longer require discovery of evidence to be inadvertent. Administrative warrants pursuant to health, fire and building codes could be used to further criminal investigations. Police would generate facts ostensibly calling for the application of an exception to the warrant requirement or for a warrant. This search or arrest power would then be used for exploratory searches, out of caprice, or to harass or punish.

Courts should seek the true purpose of searches and seizures. Acceptance of technical justifications for searches or seizures would cause the administration of justice to fall into disrepute. Although truth may be difficult to find, courts should strive for it. Any alternative would lead to disaster.

Pretextual searches and seizures are performed in bad faith. Authority to search or seize is used primarily for purposes which do not justify its use. Police should particularly be deterred from the knowing and deliberate circumvention of Fourth Amendment.

Notwithstanding bad faith, police in this case subjected respondent to an arbitrary booking, search and detention for homicide. Without any reason to suspect respondent was guilty of homicide, police did not follow standard procedures for normal arrests on parking warrants. The booking and detention for homicide were arbitrary and unreasonable under the Fourth Amendment. The seizure of respondent's palm prints was arbitrary and unreasonable since it is not normally done on parking warrant arrests and is not necesary for any administrative purpose.

Finally, no exception to the exclusionary rule applies. Police had no good faith. Seizure of respondent's palm impressions was not inevitable. Had respondent been treated as all other arrestees pursuant to parking warrants, only her index fingerprint would have been taken. The arrest warrant for homicide would not have issued without respondent's palm print matching latent print from crime scene, and her oral statements obtained during illegal arrest and detention. Inculpatory statements were only obtained by use of illegally seized palm prints matching the latent print from the crime scene.

ARGUMENT

I.

RESPONDENT WAS ARRESTED AND DETAINED FOR HOMICIDE ON FEBRUARY 5, 1982 WITHOUT PROBABLE CAUSE OR OTHER LAWFUL AUTHORITY IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

Respondent and petitioner fundamentally disagree as to whether officer Stewart arrested respondent for homicide or on the parking violation warrant on February 5, 1982. Prior to the March 17, 1983 evidentiary hearing, respondent filed her motion to suppress claiming police had arrested her for homicide (Add. to S.L.F. 3, 5). Respondent claimed this arrest to have been without authority in violation of the Fourth and Fourteenth Amendments (Add. to S.L.F. 3-4). Respondent alleged, further, that the arrest of respondent on February 5, 1982 was in violation of the Fourth and Fourteenth Amendments for an additional reason: because police utilized the apparent existence of a parking violation warrant as a "pretext" to obtain custody of respondent for "booking and interrogation" (Add. to S.L.F. 5).

It is clear from its decision in the case that the Supreme Court of Missouri analyzed whether respondent had been arrested at her home upon the homicide "pick up" or upon the parking violation warrant:

> The evidence conflicts on whether the officers arrested defendant on the outstanding parking violation warrant. Officer Sewart testified that he "arrested her for an outstanding city warrant and also asked her to accompany [them] with regards to a pickup order issued by the crimes against persons unit." He also testified that he went to her residence to take her into custody on the homicide pickup order and he did not have an arrest warrant. He advised defendant of her constitutional rights in compliance with *Miranda* although such warnings are not given on arrests for parking violations that do not involve criminal activity. Officer Stewart's partner, Officer Thomas, filed the report of the arrest under the homicide charge number as "investigation arrest-criminal homicide"; and the officers followed the procedure used for arresting and booking an individual on a homicide charge rather than that used for a traffic violation. Defendant was taken to the homicide unit at the police department's downtown station and booked there on a state charge for homicide, not for the parking violation at the district station on 63rd street. Under the normal procedure for booking a person on a municipal court parking violation, the police obtain one fingerprint of the person and allow the person to remain at the district station for four hours in order to post bond. In this case, the suspect was taken to the homicide unit where a complete set of defendant's palm and finger prints was taken, she underwent interrogation regarding the homicide, and was detained overnight. It was after all this that the police booked her on the parking violation.
>
> The conflicts thus raised by the evidence were for the trial court to resolve. The trial court resolved them in favor of defendant, and this Court defers to the trial court's determination because it is supported in the evidence.

(Pet. for Cert. A5-6, citations omitted).

A. Standard Of Review.

The factual determination that respondent was indeed arrested for homicide and not on the basis of an outstanding parking violation warrant was a determination for the Missouri courts to make. Those courts having resolved the matter in respondent's favor, this Court should now defer to that determination and dismiss this writ as improvidently granted. *Dower* v. *Richards*, 151 U.S. 658, 14 S.Ct. 452 (1894).[8]

Only in a case of clear error by a state court in resolving a factual dispute should this Court interfere with that decision. *Lammers* v. *Nissan*, 154 U.S. 650, 14 S.Ct. 1189 (1879). Not only has the Supreme Court of Missouri not erred in its resolution of the disputed facts, its determination that respondent was arrested for homicide at her home on February 5, 1982 is the only sensible resolution of the facts under Missouri law and the evidence. And it is clear that, in this Court's review of the legality of an arrest, that review will depend in the first instance upon state law. *Michigan* v. *DeFillippo*, 443 U.S. 31, 36, 99 S.Ct. 2627, 2631 (1979).

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[8] This Court has summarized its review of factual matters resolved by state courts thus:

> When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect.

Stein v. *New York*, 346 U.S. 156, 182, 73 S.Ct. 1077, 1091 (1953).

It is important to note, first, that in the trial court, petitioner held the burden of going forward with the evidence and the risk of nonpersuasion to show "by a preponderance of the evidence that the motion to suppress should be overruled," Mo.Rev.Stat. § 542.296 (1978). *State* v. *Baker*, 632 S.W.2d 52 (Mo.App. 1982).

Second, as the Supreme Court of Missouri noted, upon review of a trial court's order, "the facts, and reasonable inferences arising therefrom, are to be stated favorably to the order challenged on appeal" (Pet. for Cert. A2, citation omitted).

And third, "the reviewing court is free to disregard contrary evidence and inferences, and is to affirm the trial court's ruling on a motion to suppress if the evidence is sufficient to sustain its finding (Pet. for Cert. A2, citations omitted).

B. Respondent Was Arrested And Detained By Police On February 5, 1982 For Homicide, Without A Warrant Or Lawful Authority.

It is clear under the facts of record and Missouri law that the courts below were correct in concluding that the arrest of respondent at her home on February 5, 1982 was pursuant to the homicide "pick up" order and not pursuant to a parking violation warrant. Officer Stewart testified that prior to starting over to respondent's home that day he had been informed of the "pick up" order from the homicide unit directing that respondent be arrested for homicide (Tr. 42-43). He went to her home intending to arrest her on the basis of that order (*Id.*) It was only upon checking respondent's home address that the officers learned of an outstanding parking warrant (Ex. 3, Tr. 40-42). The officers did not physically possess the parking warrant (Tr. 35). Officer Stewart arrested respondent with the intent of bringing the law to bear upon her for a

state charge of homicide. "Miranda warnings" were administered by Stewart, who knew respondent was to be interrogated for that offense (Tr. 26, Ex. 3). The written arrest report was filed under the homicide complaint number as an "Investigation Arrest-Criminal Homicide" (*Id.*). The officers forcefully transported respondent directly to the homicide unit at 1125 Locust because "[a]rrests for state law violations and felony charges will take precedence over any possible city charge" (Tr. 36-37, 44). The commander of the homicide unit gave his written permission that respondent be taken to the detention unit and "booked" for homicide (Tr. 32). Officer Stewart conceded that, at this point in time, respondent was arrested and detained for homicide (*Id.*). Respondent was escorted to the detention unit where, at 3:40 p.m., she was formally booked on complaint number R-81013 for homicide (Ex. 4, Tr. 2, 40, 33-34).[9] Respondent was not booked on any city

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[9] After-the-fact attempts to demonstrate an arrest was made on a charge other than the one police were primarily interested in are not new. The value of booking in this regard was pointed out by Chief Justice Warren, dissenting from the dismissal of the writ of certiorari, in *Wainwright* v. *New Orleans*, 392 U.S. 598, 88 S.Ct. 2243 (1968):

> . . . this official and permanent arrest record 'provides a valuable protection against secret arrests and improper police tactics.' I see no more justification for permitting the State to disregard its own booking record than for permitting any other administrative body to disregard its own records. Quite the contrary. In the 'low-visibility' sphere of police investigatory practices, there are obvious and compelling reasons why official records should prevail over the second-guessing of lawyers and judges. Nor would holding the police to official records frustrate any legitimate interest of society. If the police in this case really believed that petitioner was the murder suspect, and if they had probable cause to so believe, all they had to do was to arrest and book him for murder.[*] If they did not have such probable cause at the time they confronted petitioner on the street, they might have used techniques short of arresting him on a trumped-up charge

parking violation warrant at that time (Ex. 10, 11, Tr. 2, 37-38).

It is clear from these facts that the arrest of respondent was for homicide and it was only incidental to the arrest that a parking warrant was outstanding. Petitioner's claim that respondent had been "lawfully arrested on the basis of an arrest warrant for an outstanding municipal parking violation" simply does not square with these facts, the findings of the courts below, or Missouri law (Brief for Pet. 15). The general law of arrest commands that before he could lawfully arrest respondent on a parking warrant, officer Stewart would have had to physically possess the warrant. 1 Varon, Searches, Seizures and Immunities, 233 (2nd ed. 1974). A warrant issued on the basis of a nonappearance to answer a parking violation must be in the possession of the arresting officer to be validly executed. Mo. Rev. Stat. § 544.180 (1978); *Rustici* v. *Weidemeyer*, 673 S.W.2d 762 (Mo. banc 1984).[10] Not only did petitioner fail to carry its burden in the trial court that officer Stewart possessed the parking warrant and therefore lawfully arrested respondent pursuant to it;

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to verify their suspicions.

[*]

[orig. text of n. 6]: Of course, I do not mean to suggest that a defendant arrested and booked for one crime cannot later be charged with other crimes. The point is simply that when a controversy arises over the legality of the arrest, the police should be held to the booked offense.

392 U.S. at 606, 88 S.Ct. at 2249-50 (citation and footnote omitted).

[10] Recently the rules applicable in cases of municipal ordinance violations were modified by the Supreme Court of Missouri waiving the requirement that an officer executing a municipal traffic warrant possess the warrant at the time of the arrest. Rule 37.46, Mo.Ann.Rules (Vernon Supp. 1986) (eff. Jan. 1, 1986). See also Mo.Rev.Stat. §544.216 (Supp. 1983).

officer Stewart clearly stated he possessed no warrant (Tr. 35). Petitioner never established a parking warrant actually existed, or whether respondent was advised one existed. And a claim that respondent was arrested pursuant to a parking warrant contradicts the sworn affidavit of Detective Lightfoot on February 8th that "[o]n 2-5-82 ZOLA M. BLAIR was arrested and interrogated regarding this homicide" (Ex. 12A). In short, petitioner's claim that the February 5th arrest of respondent at her home was pursuant to a municipal parking warrant is an *ex post facto* attempt to legitimize an unlawful seizure of respondent for homicide. This claim was conclusively rejected by the courts below and is inconsistent with the clear facts of record and Missouri law.

Petitioner has conceded that the police believed they lacked probable cause to arrest respondent for homicide, but suggests that this belief may have been mistaken (Brief for Pet. 16). Subsequent to the March 17, 1983 evidentiary hearing, petitioner requested the opportunity to adduce additional evidence in the trial court to demonstrate probable cause "for the arrest and detention of Zola M. Blair" on February 5, 1982 (S.L.F. 7). That request was granted and the rehearing set May 13, 1983 (S.L.F. 12). Instead of adducing this alleged evidence, the state voluntarily dismissed (S.L.F. 18). Again, under the new indictment, the state was given the opportunity to adduce additional evidence (Add. to S.L.F. 48). No such evidence was adduced. Rather, the state chose to rest upon that evidence properly introduced at the March 17, 1983 evidentiary hearing.[11] In this record, neither proba-

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[11] As pointed out above in the Statement of the Case of this Brief, Exhibit 22 referred to by petitioner in its Brief was filed as an exhibit herein by petitioner. Petitioner did not choose to offer this exhibit into evidence before either trial court, and this exhibit was not considered by any of the courts below. This Court should disregard it. Rule 34.5.

ble cause nor even reasonable suspicion existed to believe respondent had committed a homicide.[12]

A warrant authorizing the arrest of respondent for homicide did not exist on February 5, 1982 (Tr. 23, 57). A search warrant authorizing the search for and seizure of her palm prints did not exist (Tr. 48, 57). And the police did not have probable cause to believe respondent had committed murder (Tr. 58, Pet for Cert. A5, A23). Therefore, the arrest, booking and detention of respondent for homicide on February 5, 1982 was an unreasonable seizure in violation of the Fourth and Fourteenth Amendments. *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979); *Taylor* v. *Alabama*, 457 U.S. 687, 102 S.Ct. 2664 (1982). Since the February 5th arrest was illegal, the subsequent search for and seizure of respondent's palm prints by police were the "fruits" of that illegal detention, and were thus illegally obtained. *Davis* v. *Mississippi*, 394 U.S. 721, 89 S.Ct. 1394 (1969); *Hayes* v. *Florida*, ___ U.S. ___, 105 S.Ct. 1643 (1985). And the oral statements made by respondent within thirty minutes of being "booked", finger and palm printed for homicide, were directly brought about by the illegal arrest and detention. Specifically, the causal chain between the illegal arrest and detention and the subsequent statements was not attenuated but was completely intact. That being so, the statements by respondent to Detective Cline on February

[12] Should this Court deem Exhibit 22 relevant, even then there was no reasonable suspicion or probable cause on February 5, 1982 for police to believe respondent had committed a homicide. The tipster merely states that unnamed "children people" told her the Blairs were involved in the killing (Ex. 20 at 6). It is unclear who these children are or who they allegedly talked with. Nevertheless, the tipster does state she saw the incident on T.V. (Ex. 20 at 7). The information the tipster provides lacks consistency and reliability.

5, 1982 were also fruits of this illegal detention and were properly suppressed. (See Ex. 12A.) *Dunaway, supra; Taylor, supra.*

II. THE POLICE ARREST OF RESPONDENT ON THE PRETEXT OF EXECUTING A MUNICIPAL PARKING WARRANT WAS UNREASONABLE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS IN THAT THE PRIMARY PURPOSE FOR THE ARREST WAS TO OBTAIN CUSTODY OF RESPONDENT TO TAKE HER PALM PRINTS, AND TO INTERROGATE HER FOR HOMICIDE, WHEN NEITHER PROBABLE CAUSE NOR REASONABLE SUSPICION EXISTED TO BELIEVE RESPONDENT COMMITTED THAT OFFENSE.[13]

In addressing the pretext issue, respondent asumes, *arguendo*, that the initial arrest of her by police at her home on February 5, 1982 objectively appears to be an attempt by police to execute a warrant for a municipal parking violation.[14] That arrest, however, was unreasonable in violation of the Fourth and Fourteenth Amend-

[13] The Supreme Court of Missouri applied Art. I, §15 of the Missouri Constitution, *supra*, n. 2, as well as the Fourth Amendment to the United States Constitution to the facts of this case in concluding the arrest herein was a pretext (Pet. for Cert. A2). Also, Missouri case law was cited for the proposition that "an arrest may not be used as a pretext to search for evidence" (*Id.* at A7). Clearly, Missouri constitutional and case law was applied in this case along with federal constitutional law. Therefore, independent and adequate state grounds exist for the decision below depriving this Court of jurisdiction to review. *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 56 S.Ct. 183 (1935).

[14] This argument sets aside the fact that, under Missouri law, the police could not lawfully have arrested respondent at her home on February 5th without possessing the parking warrant (Point I, *supra*) Also, we set aside the findings of fact in this regard by the Missouri courts.

ments because the primary objective of police was, in reality, for a totally different purpose, viz., to further a criminal investigation for homicide. Specifically, police sought custody of respondent to conduct a warrantless search for and seizure of her palm print impressions and to interrogate her for homicide when there was no reason to suspect, or probable cause to believe, she committed that offense.

A. The Subjective Perspective And Intent Of The Police Have Historically Been Considered In Determining The Reasonableness Of A Search And Seizure.

1. Prior Decisions Recognizing Subjective Intent As A Factor In Searches And Seizures.

This Court has historically taken account of the subjective perspective and motivation of the police in engaging in search and seizure activity. In *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), the Court considered the officer's subjective experience and interpretation of the facts to determine the reasonableness of the officer's seizure of the suspect. Thirty-nine years as a policeman and other experience caused Officer McFadden to believe the suspects were "casing a job." 392 U.S. at 5-6, 88 S.Ct. at 1871-72. The Court specifically held that:

> . . . where a police oficer observes unusual conduct which leads him reasonably to conclude *in light of his experience* that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . he is entitled . . . to conduct a carefully limited search . . .

392 U.S. at 30, 88 S.Ct. at 1884-85 (emphasis added). This objective assessment of the facts through the subjective eyes of the officer gives meaning to what otherwise might be considered "wholly innocent" activity "to the untrained

observer." *Brown* v. *Texas*, 443 U.S. 47, 52 N. 2, 99 S.Ct. 2637, 2641 n. 2 (1979).[15]

In *Jones* v. *United States*, 357 U.S. 493, 78 S.Ct. 1253 (1958), the Court was confronted with an after-the-fact attempt by the government to change the justification for the search of Jones' home from a purpose of seizing contraband materials to a purpose of arresting petitioner. The Court recognized that the record did not support the government's claim that the officers entered the home with this subjective purpose in mind. 357 U.S. at 500, 78 S.Ct. at 1257-58.

Seizures of contraband material under the "plain view doctrine" require the reviewing court to inquire into the subjective motivation of the searching officers. In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971), the Court held that seizure of contraband in plain view is legitimate only when discovery is inadvertent. "[W]here the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it," the discovery is not inadvertent and thus not reasonable under the Fourth Amendment unless a search warrant is first obtained. 403 U.S. at 470, 91 S.Ct. at 2040. This analysis of the searching officer's mind to determine inadvertence under the "plain view" doctrine was confirmed by the Court in *Texas* v. *Brown*, ___ U.S. ___, 103 S.Ct. 1535 (1983), when Justice Rehnquist wrote on behalf of the Court, ". . . the officer must discover incriminating evidence 'inadvertently,' which is to say, he

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[15] *See also United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574 (1975) where the Court held that in the context of border patrols, "the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." 422 U.S. at 885, 95 S.Ct. at 2582, citing *Terry* v. *Ohio*, *supra*.

may not 'know in advance the location of [certain] evidence and intend to seize it, relying on the plain view doctrine only as a pretext." ___ U.S. ___, 103 S.Ct. at 1540 (quoting *Coolidge*, *supra*). What these cases have in common is an appreciation by this Court of the subjective perspective and intent of an officer when engaging in search and seizure activity.[16]

Most recently, the Court recognized the subjective motivation of police to discover evidence pursuant to a criminal investigation for arson in *Michigan* v. *Clifford*, ___ U.S. ___, 104 S.Ct. 641 (1984). In *Clifford*, fire department officials returned to the scene of a fire after it had been extinguished to pursue a criminal investigation for arson. This Court held that when the primary objective of a search is to gather evidence of criminal activity, a criminal search warrant is required. When the primary object is merely to determine the cause and origin of the

[16] Petitioner argues the subjective intent of police in engaging in search and seizure activity is irrelevant, citing *Scott* v. *United States*, 436 U.S. 128, 98 S.Ct. 1717 (1978) and *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 103 S.Ct. 2573 (1983). To the extent these cases can be read as holding this, the holdings are dicta. Further, *Scott*, *supra*, merely involved officers with a bad intent who did not have an occasion to act upon it. Specifically, Scott argued the agents intercepting telephone conversations pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 failed to minimize their interceptions as required by the Act. The government's response, adopted by the Court, was that subjective intent alone does not make otherwise lawful conduct unconstitutional. 436 U.S. at 136-137, 98 S.Ct. at 1723. Although the agents did not intend to minimize, given the nature of the calls they did not have an occasion to act upon this intent. In *Villamonte-Marquez*, *supra*, there was no finding of improper subjective intent as in the present case. Furthermore, that case merely cites the dicta of *Scott*, *supra*. See Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U.Mich.J.L.Ref. 523 (1984).

fire, the more lenient requirements for administrative search warrants will satisfy the Fourth Amendment. Thus, trial courts are required to ascertain the true and primary-purpose of the search and seizure activity to determine compliance with the Fourth Amendment. In the present case, Missouri courts quite readily determined from the facts that the true and "primary objective" in arresting Zola Blair was not to enforce the traffic code; rather, it was to further a criminal investigation for homicide.

2. Prior Decisions Condemning Duplicitous Search And Seizure Activity.

In *United States* v. *Lefkowitz*, 385 U.S. 452, 52 S.Ct. 420 (1932) prohibition agents attempted to utilize an existing arrest warrant as a pretext to conduct a search of a room. As in the case at bar, the claim was that the search of the room was merely incidental to the execution of the arrest warrant. The claim was rejected by the Court, holding "[a]n arrest may not be used as a pretext to search for evidence." 285 U.S. at 467, 52 S.Ct. at 425.[17]

In *Abel* v. *United States*, 362 U.S. 217, 80 S.Ct. 683 (1960), the Court had occasion to address the exact argument made by respondent herein. In *Abel*, the Court was faced with a claim that an arrest pursuant to an Immigra-

[17] Petitioner's Brief at 27 argues *Lefkowitz* does not condemn bad motive, just overbroad searches. This narrowed reading of *Lefkowitz* overlooks the Court's condemnation of the search as "exploratory" and "made solely to find evidence" of the charged conspiracy "or some other crime." 285 U.S. at 465, 52 S.Ct. 423. Moreover, the Court cited *Go-Bart* v. *United States*, 282 U.S. 344, 51 S.Ct. 153 (1931) with approval and as controlling. There, the Court condemned "a general exploratory search in the *hope* that evidence of crime might be found." 282 U.S. at 357, 51 S.Ct. at 158 (emphasis added).

tion and Naturalization Service (INS) warrant was used as a pretext by the government to obtain custody of Abel "so that pressure might be brought to bear upon him to confess to espionage", and to conduct a search of his belongings for evidence of espionage, incidental to the arrest. 362 U.S. at 226, 80 S.Ct. at 690. Justice Frankfurter, speaking for the Court, noted that Abel's claims were "fully canvassed" by the lower courts and that "the crucial facts were found against [him]" (*Id.*). Had a pretextual arrest in fact been made, however, the Court warned:

> . . . it would indeed reveal a serious misconduct by law enforcing officers. The deliberate use by the Government of an administrative warrant *for the purpose of gathering evidence* in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution. . . .

(*Id.*, emphasis added).[18] The INS warrant in *Abel* is comparable to the parking warrant in the present case. Blair, howver, is favored with the factual finding at all three levels of state court below that the police acted "for the purpose of gathering evidence" of homicide in arresting her.

In other contexts, this Court has recognized the problem of police using an exception to the warrant requirement for improper purposes. In *South Dakota* v.

[18] Of course, petitioner's reading of *Abel* misconstrues the holding. Brief for Pet. 26. While there is nothing wrong with coming upon evidence of espionage while executing an INS warrant, the lower courts did *not* find the warrant to be executed for that *purpose*. *Abel* is consistent with *Michigan* v. *Clifford*, *supra*, in giving recognition to the primary purpose for which the police act.

Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976) the "caretaking functions" of police concerning impounded vehicles were recognized and gave rise to an administrative right to inventory the contents of the vehicle without a warrant. This was only after the Court recognized the procedure was not being used as "a pretext concealing an investigatory police motive." 428 U.S. at 376, 96 S.Ct. at 3100. And Justice Blackmun, concurring in *Michigan* v. *Defillippo*, 443 U.S. 31, 40-41, 99 S.Ct. 2627, 2633-34 (1979) assured that a stop-and-identify ordinance used as a pretext to search persons arrested pursuant to it would not escape detection. Justice Powell concurring in *New York* v. *Class*, ___ U.S. ___, 106 S.Ct. 960, 970, n. * (1986) warned that an officer who lawfully stops an automobile may not use inspection of the Vehicle Identification Number as a pretext to search for contraband or weapons. Finally, the Court in *Steagald* v. *United States*, 451 U.S. 204, 101 S.Ct. 1642 (1981) held, in the absence of consent or exigent circumstances, officers attempting to execute an arrest warrant could not search the home of a third party without a search warrant. If a search warrant was not required to search for the individual named in the warrant, there would be a significant potential for abuse. One of those abuses would be the use of an arrest warrant "as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." 451 U.S. at 214, 101 S.Ct. at 1649.[19] All these cases condemn bad faith in the perfor-

[19] The Court cites for comparison *Chimel* v. *California*, 395 U.S. 752, 767, 89 S.Ct. 2034, 2042 (1969) where recognition is given to the problem of "timed arrests" pursuant to a warrant; that is, the tactic of waiting until the arrestee is in a place where police desire to conduct a search "incident" to the arrest. See generally L. Tiffany, D. McIntyre and D. Rotenberg, Detection of Crime, pp. 238-40 (1967).

mance of ostensibly legitimate Fourth Amendment activity for ulterior motives that do not independently conform to the Fourth Amendment.

B. Reason And Principle Require That The Fourth Amendment Be Satisfied According to the Primary Purpose For Which Police Act.

Petitioner maintains that the subjective intent of the police should not and does not ever play a role in determining the reasonableness under the Fourth Amendment of an objectively valid search and seizure. While, at first blush, this proposition may appear attracative in the application of Fourth Amendment doctrine, the actual result of such a rule would prove to reap such abuse, encourage such capricious arrests and searches, and engender such a disrespect and resentment of the police, that this Court should not adopt such an interpretation of the Fourth Amendment. The warning issued by this Court in *Boyd* v. *United States* is appropriate here:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconsitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. There motto should be *obsta principiis*.

116 U.S. 616, 635, 6 S.Ct. 524, 535 (1885). The guarantee of the Fourth Amendment, of course, is that of personal

security and liberty to all Americans and, as Justice Brandeis put it, "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man."[20] Unfortunately, it is most often in criminal cases that the protection afforded by the Amendment is made manifest; and it is here that its reach is most often tested. But, as one commentator noted, "neither the [exclusionary] rule nor the fourth amendment exists to protect the criminal in whose case the rule is applied. Both exist to protect society—all those citizens who never break laws more serious than those prohibiting overtime parking."[21] It is the personal security of the average citizen, anyone who drives or parks an automobile, anyone who strolls the streets subject to pedestrian, stop-and-identify and vagrancy ordinances, and anyone whose home is subject to health, building or fire code inspections, who is threatened by a purely objective Fourth Amendment analysis. Using such an approach, anyone or anyplace the police can legitimately arrest or search for one reason, can be arrested or searched for another, illegitimate reason: on the barest of suspicion, or whim or, worse, out of spite or revenge.[22]

The exceptions to the Fourth Amendment warrant requirement are most readily subject to abuse. For in these instances, a legitimate sounding cover story does

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[20] *Olmstead* v. *United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572 (1927) (dissenting).

[21] Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind.L.J. 329, 330-31 (1973), quoted in 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §1.2 at 24.

[22] Burkoff, *Bad Faith Searches*, 57 N.Y.U.L.Rev. 70, 101-104 (1982).

not have to be presented to the magistrate prior to arresting or searching. It is only in those instances in which evidence is found that the police must be able to concoct reasons for the application of the particular exception to the warrant requirement. The result is that sanctioning of duplicitous search and seizure activity allows for any exception to the warrant requirement to be used precisely for reasons that do not justify its use; that is, so long as the police or prosecutor are able to generate lawful sounding facts for its application. This illegitimate exercise of exceptions to the warrant requirement should meet this Courts "unqualified condemnation."[23]

Traffic codes provide law enforcement with extensive opportunities to stop, arrest and search citizens and their cars. Most states allow, expressly or impliedly, a full custodial arrest upon the commission of a traffic offense.[24] Of course, upon arrest of the driver, police may search the passenger compartment of the automobile. *New York* v. *Belton*, 453 U.S. 454, 101 S.Ct. 2860 (1981). The ease with which a technical traffic offense is used by police as a pretext to arrest and search a driver and automobile is well known. The American Bar Foundation Administration of Criminal Justice Series makes the point:

> . . . the minor offense most commonly relied upon by police to justify a search was the traffic violation. This is apparent in the following statements by policemen.

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[23] *Wainwright* v. *New Orleans*, 392 U.S. 598, 607, 88 S.Ct. 2243, 2250 (Warren, C.J., dissenting).

[24] See Appendix for list of states and statutes granting police express or implied authority to arrest for commission of traffic offense. See, e.g., Mendelson, *Arrest for Minor Traffic Offenses*, 19 Crim.L.Bull. 501 (1983).

> You can always get a guy legitimately on a traffic violation if you tail him for a while,and then a search can be made.
>
> You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway.
>
> In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search.[25]

And the sheer number and variety of traffic and parking regulations, and vehicle equipment requirements, pro-

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[25] Detection of Crime, *supra*, n. 19 at 131. Another author reported:

> The Miami police see the misdemeanor laws as their main discretionary lever. Misdemeanors are not viewed by the police as real breaches of the law, to be enforced as such. Rather, the police see misdemeanor violations as giving them enough discretion to investigate citizens whom they feel are suspicious. Policemen call this "checking someone out." Over and over again I heard the remark, "If you follow anybody for three minutes, he's going to break some kind of law, and then you can check him out." Examples of this were legion. One officer stopped a car going just a few miles over the limit, not because it was speeding, but because he suspected it might be stolen.
>
> . . . Citizens stopped for checking out purposes complain of harassment and feel that skin color, quality of clothes, make of car, and "respectability"—i.e., social class—rather than wrongdoing, determine whether a citizen will attract the attention of the police.

J. Rubin, *Police Identity and the Police Role*, in The Police and The Community, 35-36 (R. Steadman ed. 1972).

In the same series by the American Bar Foundation on the administration of criminal justice, it is noted how commonplace it is for the police to use a minor traffic offense as a pretext to conduct criminal investigations. W. LaFave, Arrest: The Decision to Take a Suspect Into Custody, 151-52, 187 (F. Remington ed. 1965).

vide a large body of law for the zealous police officer to use in obtaining custody of a person he wishes to search, interrogate, harass or punish. The Oklahoma Supreme Court recognized the complexity of these regulations and the inevitability of transgressing them when it wrote:

> There are one-way streets, no-parking zones, zones restricted to parking of particular kinds of vehicles, zones restricted to pedestrian traffic, no-left turn corners, some left turn after stop, some by mere arm signal. In some places a tail light signal is sufficient to indicate a turn or stop, and other places require an arm signal; there are various lanes in some metropolitan areas, some restricted exclusively to various classifications of traffic, and requiring a genius to get out of after once getting in, without violating the law.[26]

It should be remembered that respondent was allegedly arrested on a warrant for a parking violation. She could very well have been in her own home, minding her own business, when she allegedly violated the city ordinance. The reach of these ordinances when improperly used to support searches and seizures for other purposes is, therefore, quite apparent.

Although petitioner claims respondent was arrested pursuant to a municipal parking warrant, no warrant was shown to exist in the courts below. Petitioner claims police "issued a 'pick-up' order for [respondent's] apprehension in connection with the [homicide], knowing that an arrest

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[26] *Brinegar* v. *State*, 97 Okla.Crim. 299, 308, 262 P.2d 464, 474 (1953). This Court has also recognized the pervasive reach of traffic codes when it observed that "[s]tates and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways." *Cady* v. *Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 2528 (1973).

warrant had been issued several weeks earlier because of her failure to appear in Kansas City municipal court on an illegal parking violation." (Brief for Pet. 16).[27] There was absolutely no evidence that the "pick-up" order for respondent's arrest was issued "knowing that an arrest warrant" had been issued on a parking violation. The true facts of the matter are stated in the officers' arrest report: upon checking the address, a parking warrant was discovered (Ex. 3). Officer Stewart confirmed this to be true (Tr. 41-42). There was no testimony or evidence that any police officer knew a parking warrant existed prior to the arresting officers checking respondent's address on February 5, 1982. The parking warrant here is being used to mask the police arrest of respondent on February 5th for homicide. As noted above, in Missouri, as in most states, a custodial arrest can be made for violation of the traffic code. Since the parking warrant came to the attention of the police when they checked respondent's home, their knowledge of the grounds for arrest are the same as if they had followed her in a car or walking down the street until she had committed a technical violation of the traffic code or other city ordinance, and then arrested her.[28] The

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[27] Petitioner cites S.L.F. 4-6 in support of its representation that a municipal warrant had issued several weeks earlier on respondent's failure to appear to answer a parking violation. The pages of the supplemental legal file were attached to the state's suggestions in opposition to respondent's motion to suppress, filed March 29, 1983 (S.L.F. 1-3). These exhibits were not introduced into evidence in the trial courts despite the state's opportunities on May 13 and July 21, 1983 to do so (S.L.F. 12, Add. to S.L.F. 48). They are not of record and should not be considered. Rule 34.5.

[28] Arrests can be made for many, fairly innocuous, ordinance violations. The traffic code for the City of Kansas City, Missouri does not contain only ordinances regulating the operation of motor vehicles. It also contains regulations governing pedestrian traffic (Art. XII),

state concedes that the arrest of respondent at her home on February 5th was for the primary purpose of investigating any involvement she might have in a homicide rather than "making her answer for a municipal parking violation" (Brief for Pet. 15). Given the massive amount of city traffic and ordinance violations, approval of the arrest of respondent in this case for patently ulterior purposes grants a general license to police to arrest at whim any of the millions of Americans who are the subjects of outstanding traffic, parking or city ordinance violation "warrants". Checking such abuses will not deter the police from making legitimate traffic or parking warrant arrests when that is in fact their lawful purpose. Arrests are made for these violations of the traffic code all the time.[29]

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bicycle traffic (Art. XIII), and parking regulations (Art. XIV). Kansas City, Mo., Gen. Ordinances ch. 34 (Supp. 1984). Custodial arrests can be made for violating any of these ordinances in the view of the officer. Gen. Ordinances ch. 34, art. II, §34.7 (Supp. 1984). Mo.Rev.Stat. §544.216 (Supp. 1983). Driving violations include following a vehicle "more closely than is reasonable" (art. V §34.61); driving too slowly (art. VII, §34.91); opening or closing a vehicle door when not reasonably safe to do so (art. XI, §34.135); driving through a safety zone (art. XII, §34.163); driving across a sidewalk and failing to yield to pedestrian traffic (art. XII, §34.164). Pedestrian violations include disobeying a traffic signal (art. XII, §34.156) and failing to move upon the right half of the crosswalks (art. XII, §34.160). Bicycle violations (art. XIII) include carrying more persons than bicycle designed to carry (§34.176); failing to ride "as close as practical" to the right hand side of the road (§34.178); failing to yield right-of-way to pedestrian on sidewalk (§34.183); parking on sidewalk impeding pedestrian traffic (§34.184). Parking violations (art. XIV) include wheels not parallel and within 12 inches of curb (§34.203); overtime parking (§34.211). The point is that vast discretion is given the officer to enforce these ordinances and, thus, to make arrests.

[29] In 1963, just under three million arrests for traffic violations were made in New York City. Note, *The Inventory Search of an*

Petitioner argues that the effect of holding unlawful a parking arrest made for the primary purpose of furthering some other goal would be to immunize all those "parking violators who are suspected of serious crimes." (Brief for Pet. 32-33). Of course, in the present case, the other goal was investigating respondent's participation in a homicide; and her palm prints turned out to match those at the scene. But this case is an example of "the obnoxious thing in its mildest and least repulsive form." Petitioner argues that we should never question police motives in determining compliance with the Fourth Amendment. The police must only objectively appear to act lawfully. The argument seeks approval for police to act for any reason so long as some reason can be found to act. It requests a license to take custody of millions of Americans without probable cause to investigate any crime based entirely upon technical violations of numerous and detailed traffic regulations often unknown to the offender. Is it too much to require that police act for the purpose for which they are entitled to act? All those who violate the law should be brought to bear for that purpose. Just because a traffic offender is also suspected of a serious offense does not mean the police should not arrest. They should, however, act within the law by arresting the traffic offender for the purpose of bringing the law to bear

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Offender Arrested For Minor Traffic Violations: Its Scope and Constitutional Requirements, 53 B.U.L.Rev. 858, 865 n. 49 (1973). In 1973, police made 3,418,331 arrests for traffic offenses in Chicago. Alwin, *Searches During Routine Traffic Stops After Robinson and Gustafson: A Reexaminationn of the Illinois Distinction Between "Ordinance Traffic Violators" and "Criminals,"* 7 Loy.U.Chi.L.J. 853, 854 n. 16 (1976). And in 1982, over ten million parking violations and over one million moving violations occurred in New York City alone. Mendelson, *Arrest for Minor Traffic Offenses*, 19 Crim.L.Bull. 501 (1983).

upon her *for the traffic offense*. That, after all, is the source of the police authority to act. They must be required to act pursuant to that end. It is one thing to legitimately enforce the traffic code; it is quite another to use these laws as a means of avoiding application of the Fourth Amendment.

Adoption of petitioner's position in entirely overlooking the subjective intent of police in search and seizure activity would allow the police to use the inventory search of automobiles sanctioned by this Court in *South Dakota* v. *Opperman*, 428 U.S. 364, 96 S.Ct. 3092 (1976) as an investigative tool to discover evidence of criminal activity. Police would need only lawfully take custody of an automobile in order to invoke the inventory search exception to the warrant requirement. From this point, a full search of the automobile, on an exploratory basis, can be made all in the name of inventorying the contents of the vehicle. Search warrants authorizing the search for and seizure of particular items would no longer be needed so long as lawful custody of the vehicle has been obtained. Of course, if a citizen commits a traffic violation and is arrested, the vehicle may be impounded if the arrestee is not with a licensed driver capable of taking custody of the vehicle. Therefore, if police desire to search a person or a vehicle, they need only follow the person until a traffic offense occurs, arrest the individual and impound the vehicle. The Fourth Amendment could be continuously circumvented.

Also, eliminating the officer's subjective intent as a factor in Fourth Amendment analysis would completely do away with the requirement that contraband evidence observed in plain view be discovered inadvertently. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022 (1971); *Texas* v. *Brown*, ___ U.S. ___, 103 S.Ct. 1535

(1983). There would be no plausible way to determine whether the discovery of evidence was inadvertent; that is to say, whether the location of evidence was known to the searching officer in advance and whether the officer intended to seize it, without searching the subjective intent of the officer. If subjective intent is always irrelevant to Fourth Amendment analysis, no trial court could determine if a searching officer knew the location of certain evidence in advance and intended to seize it.

Vagrancy and disorderly conduct ordinances would provide fertile ground to the officer seeking custody of a person to conduct an exploratory search. In a recent case decided by the Arkansas Supreme Court, a person suspected of murder was apparently arrested for public intoxication. *Richardson* v. *State*, 706 S.W.2d 363 (1986). The trial court found probable cause for the arrest, but the Supreme Court found the arrest was only made as a pretext to search the arrestee for evidence of murder. "Pretext," the court said, "must be a matter of the arresting officer's intent, and that must be determined by the circumstances of the arrest." 706 S.W.2d at 365.

Traffic codes, disorderly conduct, vagrancy and stop-and-identify laws are not the only laws providing police with authority to conduct illegitimate searches and seizures. Search warrants authorizing the search for and seizure of certain items can be used as a tool to conduct unauthorized searches. Health, fire and building codes authorize searches for compliance with their provisions. Since the aim of the search is presumably not to conduct a criminal investigation, a different and less stringent standard of probable cause will suffice for issuance of a search warrant. *Camara* v. *Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727 (1967). If the primary object of the search is not relevant to the Fourth Amendment, these administrative

warrants could be used for any purpose. In those states where "the health inspectors are none other than the police themselves," these administrative warrants will serve as the tool for zealous officers to conduct general exploratory searches for criminal activity.[30] The more dreaded result would be the use of these administrative warrants to intrude into the privacy of one's home for purposes of harassment or other ill will.[31] This result would be disastrous.

Viewed through the eyes of the average citizen, the result of a Fourth Amendment doctrine that does not question police motives can only engender fear and resentment of police. If the police are well meaning and act out of suspicion of criminal activity, bare as it may be, the result may be that their hunch is correct. More often than not, however, the hunch will be wrong and the citizen will be left to feel the humiliation and embarrassment of police suspicion. But police are human also. If their

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[30] *Franks* v. *Maryland*, 359 U.S. 360, 375, 79 S.Ct. 804, 813 (1959) (Douglas, J., dissenting).

[31] It was in 1761 that James Otis, in arguing against writs of assistance, protested against this illegitimate use of authority:

> . . . officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. This wanton exercise of this power is no chimerical suggestion of a heated Brain—I will mention some facts. . . . Mr. Justice Wally had called this same Mr. Ware before him by a constable, to answer for a breach of the Sabbath day acts, or that of profane swearing. As soon as he had done, Mr. Ware asked him if he had done, he replied yes. Well then, says he, I will shew you a little of my power—I command you to permit me to search your house for unaccustomed goods; and went on to search his house from the garret to the cellar, and then served the constable in the same manner.

2 L. Wroth & H. Zobel, Legal Papers of John Adams 142-143 (1965).

motives go unquestioned, they will have a license to search out of spite or prejudice. This conduct must come to the attention of the courts and citizens must know that police are not permitted the illegitimate use of their authority.

If subjective intent of the police is made totally irrelevant to Fourth Amendment analysis, such activity will never be deterred as it will never come to the attention of the courts.

The courts should not turn their backs on police motives for searches and seizures. The administration of justice should not be merely concerned with objectively lawful conduct, in the face of subjective activity by the police not sanctioned by the Fourth Amendment. The citizen who falls prey to this activity will not have trouble recognizing the true purpose of the police. Courts may have difficulty in determining the actual subjective, primary purpose of the arrest or search. In many cases, the circumstantial evidence will be so overwhelming that the primary purpose of the arrest or search will be obvious. The present case and *Richardson* v. *State*, *supra*, are good examples of this. Furthermore, police officers themselves may testify as to their primary purpose in arresting or searching. It would be a perverse result indeed if a court held an arrest for a traffic offense lawful in the face of an officer who expressly testified he arrested the defendant not for the traffic offense but out of anger, prejudice or whim. Such a result could only bring disrepute to our system of justice. Difficult as intent may be to prove, this is no reason to overlook it when it can be demonstrated.[32]

[32] "If justice requires [a] fact to be ascertined, the difficulty of doing so is no ground for refusing to try." O.W. Holmes, The Common Law, 48 (1881), quoted in Burkoff, *Bad Faith Searches*, 57 N.Y.U.L. Rev. 70, 113 (1982); quoted also in Burkoff, *Rejoinder: Truth, Justice and The American Way—Or Professor Haddad's "Hard Choices,"* 18 U.Mich.J.L.Ref. 695, 701 n. 25 (1985).

Finally, pretextual search and seizure activity is, by definition, performed ostensibly for one purpose but in reality, primarily for another purpose not sanctioned by the Fourth Amendment. Therefore, pretextual activity is done in bad faith. There is a calculaed design to use an exception to the warrant requirement, or a warrant, for the primary purpose of achieving ulterior ends. When arrests for totally innocuous transgressions of muncipal law are used as a means to obtain custody of a citizen for the primary purpose of searching her body without a warrant and interrogating her for a crime there is no reason to suspect she committed, this activity is particularly obnoxious to any scheme of ordered liberty. This is a deliberate circumvention of the command of the Fourth Amendment.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. *United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369 (1948). There is no evidence that the police in this case sought judicial permission to obtain Zola Blair's palm prints, although plenty of opportunity existed to do so. No one asked her permission to take her palm prints. No one asked her to consent to questioning. She was arrested, forcefully taken to the homicide unit, forcefully taken to the jail, booked for homicide, finger and palm printed, and then interrogated. All this was done with absolutely no indication she had anything to do with a homicide. But the most disturbing fact is that a parking warrant is now used in an attempt to hide this obvious

purpose based upon the caprice of the police. Concoction of this cover story is a flagrant attempt to circumvent the Fourth Amendment. The message to police in the Court now prohibiting this circumvention of the Fourth Amendment should be made simply and clearly: to search or seize pursuant to an exception to the Fourth Amendment, you must actually do so (and not just pretend to do so) for the reasons which justify the search.

III.

NOTWITHSTANDING THE SUBJECTIVE INTENT OF THE POLICE, THE BOOKING, SEARCH AND DETENTION OF RESPONDENT PURSUANT TO A HOMICIDE INVESTIGATION NO PROBABLE CAUSE OR REASONABLE SUSPICION EXISTED TO BELIEVE RESPONDENT COMMITTED WAS ARBITRARY AND UNREASONABLE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

Contrary to petitioner's assertion that the breadth of the search and detention of respondent is not in contention, respondent asserts that even without regard to the bad intent of the police in this case she was subjected to a booking, search and detention that were totally arbitrary and unreasonable under the Fourth and Fourteenth Amendments (Brief for Pet. 28).

As shown above, no probable cause or reasonable suspicion existed to believe respondent committed homicide. Setting aside respondent's argument under I, *supra*, that she was arrested for homicide, and overlooking the bad faith of the police outlined in II, *supra*, police still subjected respondent to procedures and detention in violation of the Constitution.

First, police did not give respondent the benefit of the standard procedures all other persons arrested on park-

ing warrants receive. She was not taken to her local district station on 63rd street and allowed to wait there to post bond. She was transported directly to the homicide unit at downtown police headquarters (Ex. 3, Tr. 32). At that location, a permission slip was given to the arresting officers by the commander of the homicide unit authorizing the officers to have respondent booked for homicide (Tr. 32-33). Respondent was booked for homicide at the detention unit, not for the parking warrant (Tr. 33, Ex. 4). As part of this procedure, respondent's palm prints were taken (Tr. 56). Respondent could not post bond and gain her release on the parking warrant since she was not booked on that warrant (Tr. 32). Subsequent to being booked for homicide and being palm printed, respondent was subjected to interrogation for homicide (Tr. 55).

As outlined above, the police department's standard procedures in arresting pursuant to parking warrants were not followed in this case. Had they been, respondent would never have been brought to the homicide unit, she would not have been booked for homicide, her palm prints would not have been taken, and she would have been allowed to remain at her district station on 63rd street (Tr. 30). The failure of police to follow these procedures was itself arbitrary and unreasonable.[33]

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[33] "It is the fact of the departure from the accepted way of handling such cases which makes the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation; 'a paramount purpose of the Fourth Amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures.'" 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §1.2(g) at 52 (Supp. 1985) (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L.Rev. 349, 417 (1974).

Under this analysis, it is also relevant to note that the police sought respondent's palm prints presumably from the time they realized her palm prints were not in police files, January 27, 1982 (Tr. 14). There were no exigent circumstances that prevented the police from seeking some judicial authorization to seize her palm prints. There was presumably nothing that prevented the police from seeking her consent for police to take her palm prints. Instead, the police procedure utilized in this case was anything but an attempt to minimize the instrusion into respondent's life. As noted, respondent was not booked on the parking warrant, but held on the homicide booking overnight. She was again subjected to interrogation for homicide the following morning (Tr. 22). Finally, after prolonged questioning, the police decided to release her (*Id.*).

Respondent was finally arrested and booked on the parking warrant at 10:59 a.m. the next day, February 6, 1982 (Ex. 10 and 11). Her right index finger was inked and placed on the back side of the form 85PD (Ex. 10). She was released at 12:55 p.m. upon posting the fifty-dollar bond (Ex. 11). Until she was booked at 10:59 a.m. on February 6, 1982, the detention of respondent was totally arbitrary. There is no reason shown why police did not book her and allow her to post bond when she was arrested on the afternoon of February 5, 1982. In short, there is no plausible explanation for subjecting respondent to the homicide booking, the palm printing and the detention other than to say it was done on the whim of the police. This caprice is unreasonable and in violation of the Fourth and Fourteenth Amendments.

IV.

ASSUMING THE ARREST OF RESPONDENT WAS UNLAWFUL, SUPPRESSION OF HER STATEMENTS AND PALM PRINTS, AND THE QUASHING OF THE ARREST WARRANT, WAS PROPER UNDER THE CIRCUMSTANCES OF THE FACTS OF THIS CASE.

Petitioner argues that, assuming the arrest of respondent was unlawful, the exclusionary rule should not be applied in this case because the officers acted in good faith in arresting respondent. This argument is without merit. Respondent was forcefully taken to the homicide unit where permission was obtained by the officers to "book" respondent for homicide. This alone destroys petitioner's argument of good faith. The subsequent facts of booking respondent for homicide, palm printing her and detaining her for that offense all demonstrate bad faith by the officers. Officer Stewart testified respondent was not free to leave but was detained for homicide when booked for that offense.

Subjecting respondent to the arbitrary search and detention also belies petitioner's claim of "good faith."

Finally, the Missouri Supreme Court appropriately noted the officers acted in bad faith (Pet. for Cert. at A11).

There is no occasion for the application of the inevitable discovery doctrine since respondent's palm prints would not have been taken if police had treated her as all other persons arrested for outstanding parking warrants (Tr. 31).

Finally, the warrant for the arrest of respondent for homicide obtained February 8, 1982 would not have been issued but for the match of respondent's palm print to the latent print at the crime scene, and the statements obtained from respondent while detained on February 5,

1982. This warrant was therefore the direct fruit of the seizure of respondent's palm prints and her oral statements while illegally detained on February 5, 1982. *Taylor* v. *Alabama*, 457 U.S. 687, 102 S.Ct. 2664 (1982).

When respondent was arrested pursuant to this warrant on February 8, 1982, she was again booked for homicide and again interrogated. Respondent again denied knowledge of the homicide (Tr. 61). Detective Cline confronted respondent with the illegally seized palm print of February 5, 1982 and the fact that it was found to match the latent palm print from the crime scene. It was only after being presented with this "match" that respondent admitted knowing the victim and having been with him (Tr. 63). Therefore, no attenuation between the Fourth Amendment violation and the inculpatory statement is shown. In fact, just the opposite is the case: the fruit of the Fourth Amendment violation, the palm print, produced the inculpatory statement. Therefore, the statement was properly suppressed. *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248 (1979); *Taylor* v. *Alabama*, *supra*.

CONCLUSION

For all the foregoing reasons, respondent requests this Court to affirm the judgments of the courts below and remand this case so that respondent may proceed to trial for disposition of the indictment pending against her.

Respectfully submitted,

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APPENDIX

APPENDIX

The following states allow a full custody arrest for traffic ordinance violations. In some states, the authority is implicit in the cited statutes.

Alabama	Ala. Code Tit. 32 ch. 5-310 (1975).
Arizona	Ariz. Rev. Stat. § 28-1053, § 13-3883 (1976).
Connecticut	Conn. Gen. Stat. § 14.140, § 54-1F (1958).
Delaware	Del. Cod. tit. 21, § 701 and tit. 11, § 1904 (1974)
Florida	Fla. Stat. Ann. § 901.15 (1985).
Georgia	Ga. Code Ann. § 17-4-20 (1982).
Hawaii	Haw. Rev. Stat. § 803-5 (1976).
Idaho	Idaho Code § 49-1110, 1111; § 50-209 (Supp. 1985).
Indiana	Ind. Code Ann. § 9-4-1-130.1, 35-33-1-1 (Burns Supp. 1985).
Iowa	Iowa Code Ann § 321, 485 (West. Supp. 1985).
Kansas	Kan. Stat. Ann. § 8-2105, § 22-2401 (Vernon 1977).
Louisiana	La. Rev. Stat. Ann. § 32.391.
Maine	Me. Rev. Stat. tit. 29 § 2301 (1983).
Maryland	Md. Transportation Code Ann. § 26-202 (1984).
Massachusetts	Mass. Gen. Laws Ann. ch. 85 § 11 (West 1984).
Michigan	Mich. Comp. Laws § 9.2427; § 5.2114 (1984).
Minnesota	Minn. Stat. § 169.81, § 629.30 (1978).
Mississippi	Miss. Code Ann. § 63-9-23 (1972).
Missouri	Mo. Rev. Stat. § 544.216 (Supp. 1983).
Nevada	Nev. Rev. Stat. § 484.793, § 171.104 (1985).
New Jersey	N.J. Rev. Stat. § 39:5-25 (1985).
New Mexico	N.M. Stat. Ann. § 66-8-122, § 3-13-2 (1978).

New York	N.Y. Veh. and Traf. Law § 155 (1985).
North Carolina	N.C. Gen. Stat. § 20-188 (1983).
Ohio	Ohio Rev. Code Ann. § 4513.39 (Page 1985).
Oklahoma	Okla. Stat. tit. 47 § 16-114 (1985).
Pennsylvania	Pa. Cons. Stat. § 75-6304, § 53-4612 (1977).
Rhode Island	R.I. Gen. Laws § 31-27-12 (1956).
South Carolina	S.C. Code § 56-5-420 (1976).
Texas	Tex. Traf. and Reg. tit. 6701d, § 147, 148, 150 (1975).
Virginia	Va. Code § 46.1-178, § 15.1-138 (1985).
Washington	Wash. Rev. Code § 46.64.015 (1986).
West Virginia	W.Va. Code § 17C-19-3, § 8-14-3 (1966).
Wisconsin	Wis. Stat. § 345.22 (1985).
Wyoming	Wyo. Stat. § 31-237 (1975).

REPLY

BRIEF

No. 85-303

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MISSOURI,
Petitioner,

vs.

ZOLA BLAIR,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT, EN BANC

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE

The respondent, in footnotes 4 and 5 of her brief (Res.Br. 3, 4), correctly points out two minor errors in the petitioner's original Statement of the Case, neither of which has any bearing on the legal issues presented by this petition. First, as the respondent correctly notes, both indictments filed in this case did, in fact, allege that the victim's cause of death was "by drowning"; the only significant difference between the two is that the new indictment issued on May 13, 1983, described the property stolen from the victim as "household furniture", an allegation that did not appear in the original indictment (Add. to Supp.L.F. 1; Joint Appendix 2-3).

Also, although the petitioner's original brief erroneously states, as a result of a typographical error, that the body of the victim, Carl J. Lindstedt, was found "[o]n November 11, 1981," the body was, in fact, discovered on November 24, 1981 (Supp.L.F. 65).

However, in two subsequent footnotes, footnote 6 (Res.Br. 4) and footnote 7 (Res.Br. 6), the respondent argues that the petitioner had "improperly" referred to two of her exhibits which, she insists, are not part of the record in this case. The respondent contends that neither the transcript of a tape-recorded conversation between the informant and Detective Dan Cline (Def.Exh. 20), or Detective Cline's report concerning his February 5th interrogation of the respondent (Def.Exh. 8) can be considered by this Court, because they were not "offered nor received into evidence in either of the trial courts" and because neither the Court of Appeals nor the Missouri Supreme Court "appear[ed] to have relied upon [them] in reaching their decisions" (Res.Br. 4 n. 6, 6 n. 7).

The respondent appears to be pulling this Court's leg. In the first place, both of these documents were marked as defense exhibits at the evidentiary hearing that was held on March 17, 1983, before Judge Levitt, and Detective Cline, at the respondent's urging, identified these exhibits and testified concerning them during the course of that hearing (Tr. 51-53, 55). Although never formerly introduced or admitted into evidence, these exhibits, under Missouri law, were just as much in evidence as if these formalities had been complied with. *State v. Robinson*, 664 S.W.2d 543, 547[12] (Mo.App., E.D. 1983); *State v. Jackson*, 635 S.W.2d 495, 496 (Mo.App., S.D. 1982); *State v. Sanders*, 608 S.W.2d 507, 509[4] (Mo.App., W.D. 1980); *State v. Swenson*, 551 S.W.2d 917, 921[13] (Mo. App., K.C.D. 1977).

Furthermore, when this issue came before Judge Coburn for decision, it was stipulated by both parties that he was "to utilize the transcript of the prior hearing before Judge Levitt," the briefs filed in that case, and any supplemental briefs that might be filed by the respective parties (Supp.L.F. 19). Subsequently, the respondent filed a brief in support of her motion to suppress, to which she attached Defendant's Exhibits 1 through 22, including Defendant's Exhibit 8, Detective Cline's report of his February 5th interrogation of the respondent (Supp.L.F. 8), and Defendant's Exhibit 20, Detective Cline's transcribed conversation with the informant (Supp.L.F. 74-90). The brief filed by the respondent, together with the attached exhibits, were then incorporated in the Supplemental Legal File that was filed with the Missouri Court of Appeals, Western District, and therefore was also before the Missouri Supreme Court when the case was transferred from the Court of Appeals.

Thus, the exhibits which the respondent now asserts are not part of this record are *her* exhibits which were identified and referred to at the hearing on her motion to suppress, were subsequently attached to the brief she filed before Judge Coburn, and were then incorporated in the legal file that was filed with the Western District of the Court of Appeals and the Missouri Supreme Court. Thus, her argument that they are not properly part of the record is simply ludicrous and cannot be taken seriously.

REPLY ARGUMENT

I.

The Missouri Supreme Court did not, as the respondent contends, make a "factual determination" that she was arrested only for homicide and not on the basis of the outstanding parking violation warrant, since it was undisputed that such a warrant existed and provided at least partial justification for the respondent's arrest on February 5, 1982.

At the outset of her argument, the respondent contends that this case does not present a federal constitutional question at all because the Missouri Supreme Court made a "factual determination" that the respondent was arrested solely for homicide on February 5, 1982, "and not on the basis of an outstanding parking violation warrant" (Res.Br. 11). The respondent asserts that since this factual matter" was resolved in the respondent's favor at trial, "this Court should now defer to that determination and dismiss this writ as improvidently granted" (Res.Br. 11).

The respondent bases her argument on language which appears in the majority opinion issued by the Missouri Supreme Court in this case. In that opinion, Judge Higgins states in one place that "[t]he evidence conflict[ed] on whether the officers arrested defendant on the outstanding parking violation warrant" and that these "conflicts" were "for the trial court to resolve." *State v. Blair*, 691 S.W.2d 259, 261-262 (Mo. banc 1985).

The "conflicts" that the majority perceived to find in the evidence stemmed from the fact that Officer Stewart, although testifying that he had arrested the respondent for both homicide and "for an outstanding city warrant", *id.*, 691 S.W.2d at 261, nevertheless allegedly admitted that he did not have physical possession of a warrant; that he had advised the respondent of her *Miranda* rights, although such warnings are not given on arrests for parking violations that do not involve criminal activity; that Officer Stewart's partner, Officer Thomas, filed a report of the arrest under the homicide charge number as "investigation arrest—criminal homicide"; and that the officers initially followed the procedures for arresting and booking an individual on a homicide charge rather than those used for a traffic violation. *Id.*, 691 S.W.2d at 261-262.

However, such evidence could accurately be said to have been "conflicting" only if the petitioner had attempted to argue that the respondent's arrest had not had a dual purpose. In this case, it was undisputed that the respondent was arrested for *both* the outstanding city warrant and suspicion of homicide, and that the police booked her for the homicide charge first because they believed the arrest on the homicide took precedence over the city warrant (Tr. 37).

In fact, even though the Missouri Supreme Court purported to discover "conflicts" in the evidence, the facts of this case have never been in dispute. The record in this case is replete with evidence that an arrest warrant had been issued for the respondent's failure to appear in Kansas City Municipal Court on the illegal parking charge long before the police suspected her of any involvement in the Lindstedt homicide, and that the arresting officers were aware of the existence of this warrant prior to her arrest on February 5. Officer Stewart testified at the hearing on the motion to suppress that he had arrested the respondent "for an outstanding city warrant" and that he also "asked her to accompany [them] with regards to a pickup order issued by the crimes against persons unit" in the Lindstedt homicide (Tr. 23). This testimony was confirmed by the report of Officer Thomas (Def.Exh. 3), a document referred to by the Missouri Supreme Court to support its conclusion that the evidence "conflict[ed]". Although Officer Thomas had written "Investigation Arrest Criminal Homicide" in a tiny box at the top of the report under the heading "Character of Case," he also wrote in the body of his report that the respondent had been arrested in connection with "KCMO parking warrant #03258431" as well as on the basis of the pickup order issued in connection with the Lindstedt homicide (Supp. L.F. 50).

Evidence adduced at the hearing on the respondent's motion to suppress, including Defendant's Exhibits Nos. 10 and 11, also established the existence of the city warrant and the fact that she was booked on that warrant once the police were finished questioning her about the Lindstedt killing (Tr. 37-38; Supp.L.F. 63, 64). At the trial court's request (Tr. 92), the petitioner submitted to the court as exhibits to its suggestions in opposition to the

respondent's motion to suppress, the original traffic ticket received by the respondent (Supp.L.F. 5), a notice from the Kansas City Municipal Court that a warrant was ordered to have issued for her failure to appear in connection with that charge (Supp.L.F. 6), and a 'ranscript of her municipal case, showing the issuance of a bench warrant on "January 8, 1982" and her subsequent plea of guilty to the underlying offense and her payment of a $15 fine (Supp.L.F. 4).[1]

The only "conflict" in this case, then, concerned, not the existence *vel non* of the parking warrant or the fact that it was used to provide at least partial justification for the respondent's arrest on February 5, 1982, but rather whether the arresting officers' desire to question her concerning the Lindstedt homicide, and take her fingerprints for comparison purposes, served to render that arrest legally "pretextual" and therefore unlawful. At no point in the proceedings below has the respondent ever challenged the existence or validity of the municipal warrant, or the fact that the police ostensibly used this outstanding warrant as a basis for arresting her on February 5th. Rather, the respondent's argument has always been—at least up to now—that the subjective intent of the arresting officers rendered what would otherwise have

1. Although the respondent now belatedly asserts that these exhibits should not be considered because they were not "introduced into evidence at the hearing on the motion to suppress" (Res.Br. 24 n. 26), the exhibits were filed in the trial court at the request and with the implicit approval of Judge Levitt (Tr. 92), and were incorporated in the Supplemental Legal File that was before both the Court of Appeals and the Missouri Supreme Court (Supp.L.F. 4-6). In other words, all three of the courts which have considered this case possessed these documents as part of the official record, and the respondent cannot now reasonably argue that they are not properly part of the record.

been a lawful arrest for the parking warrant into an unlawful, "pretextual" arrest for homicide. This was the thrust of the respondent's motions to dismiss (Supp.L.F. 22, 24, 31-33, 37; Add. to Supp.L.F. 5, 18, 27, 32), her arguments at the hearing on the motion to dismiss (Tr. 78-79, 83) and in her briefs to the Court of Appeals and the Missouri Supreme Court. In other words, the respondent has consistently argued that the existence of the outstanding city warrant served merely as a "pretext" for her arrest, and that the officers' subsequent actions in treating her as a homicide suspect first and only secondarily as a parking scofflaw, established the "pretextual" nature of the arrest.

Viewed in this context, the opinion of the Missouri Supreme Court cannot be read as holding that the trial judge could have found that no warrant existed for the respondent's arrest, or that the police did not purport to arrest her under the authority of that warrant. Rather, a more reasonable interpretation of the court's ruling, particularly in view of its extensive treatment of the substantive constitutional issues involved in the case, is that the respondent was not *legally* arrested on the municipal warrant because of the ulterior motives of the police as illustrated by the procedures they followed subsequent to her arrest.[2]

2. This interpretation is supported by the court's reliance upon *United States v. Prim*, 698 F.2d 972 (9th Cir. 1983), and *United States v. Millio*, 588 F.Supp. 45 (W.D. N.Y. 1984). *State v. Blair, supra*, 691 S.W.2d at 262. In both of those cases the arrests were held to have been "pretextual", not because the presence of conflicting evidence or the existence of a factual dispute, but because of legal determinations (*i.e.*, that the arrest of the defendant in *Prim* by federal agents was not justified by the state nonsupport warrant, and that the seizure of the defendant's car in *Millio* was not authorized by the existence of the parking "scofflaw").

Therefore, although the respondent contends that this Court is without jurisdiction to decide this case because the decision of the Missouri Supreme Court purportedly rests on an adequate and independent state ground, the court's opinion clearly lacks a "plain statement", *i.e.*, a "clear and express statement", that its decision rests on adequate and independent state grounds. *Michigan v. Long*, 463 U.S. 1032, 1042 n. 7, 103 S.Ct. 3469, 3477 n. 7, 77 L.Ed.2d 1201 (1983). This Court will assume that no such grounds exist where, as here, "it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Id.*, 463 U.S. at 1042, 103 S.Ct. at 3477.[3]

The respondent also asserts that since the Missouri Supreme Court made reference in its opinion to Art. I, § 15 of the Missouri Constitution, and cited Missouri case law for the proposition that "an arrest may not be used as a pretext to search for evidence", this application of "Missouri constitutional and case law" amounted to an inde-

3. The respondent alternatively argues that the Missouri Supreme Court's supposed holding that she was not arrested pursuant to the municipal warrant is a matter of "historical fact" binding upon this Court (Res.Br. 8, 12). However, as previously emphasized, this holding was essentially a *legal* conclusion, not a factual determination. Moreover, this Court is not bound by factual findings made by a state trial court that are contrary to "conceded facts", *Stein v. New York*, 346 U.S. 156, 182, 73 S.Ct. 1077, 1091[22], 97 L.Ed. 1522 (1953), and will not hesitate to ignore factual findings by a state appellate court where it is "indisputably clear" that those findings are contrary to the record. *Cady v. Dombrowski*, 413 U.S. 433, 449, 93 S.Ct. 2523, 2532, 37 L.Ed.2d 706 (1973). If this Court were to allow itself to be "completely bound" by an incorrect state court factual finding, it would mean that "federal law could be frustrated by [a] distorted fact finding." *Stein v. New York, supra*, 346 U.S. at 181, 73 S.Ct. at 1091[19].

pendent and adequate state ground for its decision which "depriv[es] this Court of jurisdiction to review" this case (Res.Br. 16 n. 13).

Not so. Although the court in *Blair* did make a passing reference to Art. I, § 15 of the state constitution,[4] *id.*, 691 S.W.2d at 260, and cited, *inter alia*, two state cases for the principle that "an arrest may not be used as a pretext to search for evidence", *id.*, 691 S.W.2d at 262[5], it is obvious that the Missouri Supreme Court resolved the "pretextual arrest" issue on the basis of federal constitutional law. As in *New York v. Class*, ... U.S. ....., 106 S.Ct. 960, 964[1], 89 L.Ed.2d 81 (1986), the state court opinion mentions the Missouri Constitution "but once, and then only in direct conjunction with the United States constitution." As in *Class*, "[t]he opinion below makes use of both federal and [Missouri] cases in its analysis, generally citing both for the same proposition."[5] *Id.*, 106 S.W.2d at 964[1]. Again, there is no "plain statement" that the Missouri Supreme Court's ruling on the "pretextual arrest" claim rests on state grounds. *Id.*, 106 S.Ct. at 964[1]. In fact, it is "plain" that it does not, but rather

4. Art. I, § 15 reads as follows:

"That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation."

5. The principal case cited by the court in *Blair* as its authority for the rule that "an arrest may not be used as a pretext to search for evidence" was *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed.2d 877 (1932). *Id.*, 691 S.W.2d at 262[5]. The two Missouri cases cited as authority for this proposition, *State v. Goodman*, 449 S.W.2d 656, 659[2] (Mo. 1970), and *State v. Howell*, 543 S.W.2d 836, 838[3] (Mo. App., Spr.D. 1976), both relied on *State v. Moody*, 443 S.W.2d 802, 804[2] (Mo. 1969), which relied in turn on *Lefkowitz*.

rests on Fourth Amendment grounds. *State v. Blair, supra,* 691 S.W.2d at 260.[6]

Since the state court's decision fairly appears to rest primarily on federal law, or, at the very least, to be interwoven with federal law, and since the adequacy and independence of any possible state law ground is not clear from the face of the opinion, this Court must conclude, as the most reasonable explanation, that the state court decided the case the way it did because it believed that federal law required it to do so. *Michigan v. Long, supra,* 463 U.S. at 1040-1041, 103 S.Ct. at 376; *New York v. Class, supra,* 106 S.Ct. at 964[1]; *California v. Carney,* 471 U.S. ....., 105 S.Ct. 2066, 2068 n. 1, 85 L.Ed.2d 406 (1985).[7]

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6. Although differing somewhat in phraseology, Article I, § 15 of the Missouri Constitution, is substantively identical to the Fourth Amendment and Missouri courts have held that the two standards are wholly consistent. *State v. Jefferson,* 391 S.W.2d 885, 888[4] (Mo. 1965).

7. Of course, even if the respondent was correct in arguing that the "pretextual arrest" issue was decided by the Missouri Supreme Court on an adequate and independent state ground, that would not deprive this Court of jurisdiction to hear this case, since it would in no way affect the Missouri Supreme Court's further holdings, made squarely upon federal constitutional law, that (1) the "good-faith" exception to the exclusionary rule did not apply; (2) that the "inevitable discovery" doctrine was not applicable, and (3) that the respondent's subsequent confession was tainted by the prior, allegedly unlawful arrest, issues which also are presently pending before this Court.

II.

The respondent's claim, made for the first time in this Court, that her arrest on the municipal parking warrant was invalid because the warrant was not in the possession of the arresting officers at the time of the respondent's apprehension, cannot be considered by this Court since it was never raised or ruled upon in the courts below. Moreover, such an assertion is unsupported by either the record or Missouri law.

The respondent, for the first time in this case, asserts that her arrest on the basis of the municipal parking warrant was invalid as a matter of state law because, according to the respondent, "[a] warrant issued on the basis of a nonappearance to answer a parking violation must be in the possession of the arresting officer to be validly executed" (Res.Br. 14).

This issue, however, was never raised in the courts below, or considered by *any* Missouri court. In holding the respondent's arrest to have been "pretextual", the Missouri Supreme Court assumed the validity of the warrant. *State v. Blair, supra,* 691 S.W.2d at 262[5], 263[6].

This Court must do likewise. In a case before this Court, a respondent "may make any argument *presented below* that supports the judgment of the lower court" (emphasis added). *Hankerson v. North Carolina,* 432 U.S. 233, 241 n. 6, 97 S.Ct. 2339, 2344 n. 6, 53 L.Ed.2d 306 (1977). Because the respondent failed to raise this question "in a timely fashion during the litigation", it may not be presented in this Court. *Steagald v. United States,* 451 U.S. 204, 209, 101 S.Ct. 1642, 1646[1], 68 L.Ed.2d 38 (1981). This Court has consistently "declin[ed] to reach"

issues which were not presented or considered in the state court. *Sandstrom v. Montana,* 442 U.S. 510, 527, 99 S.Ct. 2450, 2460-2461[9], 61 L.Ed.2d 39 (1979).

Moreover, while the respondent now complains that the arresting officers did not have physical possession of the arrest warrant at the time they apprehended her, the record fails to support this assertion. Although Officer Stewart testified that "[t]here was no warrant, there was a pickup order", this answer was in response to a question asking if he had arrested the respondent for homicide (Tr. 23). He reaffirmed in subsequent testimony that he did not have a "physical copy of any warrant" (Tr. 35), but again this answer came in response to a question as to whether he possessed "a warrant for her arrest for the homicide" (Tr. 35). At no time was he ever asked whether he, or his partner, Officer Thomas, had physical possession of the municipal warrant, and so the record is silent on this point.

In any event, Missouri law does not require that a Kansas City police officer, serving a municipal warrant within the city limits, have physical possession of that warrant. The respondent, in arguing to the contrary, cites *Rustici v. Weidemeyer,* 673 S.W.2d 762 (Mo. banc 1984), and "§ 554.280," RSMo 1978 (Res.Br. 14).[8] However, neither this case nor the statute the respondent apparently meant to cite supports her argument.

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8. § 544.280 refers to "[t]he order of conducting the trial or hearing, with respect to the introduction of the evidence and the examination of witnesses". Presumably, the respondent meant to cite to § 544.180, RSMo 1978, which provides:

> "An arrest is made by an actual restraint of the person of the defendant or by his submission to the custody of the officer, under authority of a warrant or otherwise. The officer must inform the defendant by what authority he acts, and must also show the warrant if required."

In *Rustici v. Weidemeyer, supra,* the court held only that a warrant issued on the basis of a nonappearance to answer a parking violation must be in the possession of the arresting officer if the arresting officer attempts to execute that warrant outside of the jurisdiction which issued that warrant. *Rustici v. Weidemeyer, supra,* 673 S.W.2d at 770-771[23-27]. The court noted that, absent some statutory exception, "the general rule is that an officer must possess the warrant in order to validly execute it", and that § 544.180 enunciates this general rule. *Id.,* 673 S.W.2d at 771[26].

However, the court had previously observed that this requirement is subject to certain statutory exceptions and noted that § 84.710.2, RSMo 1978, empowers police officers in Kansas City to arrest any person "whom they have reason to suspect of having violated any law of the state or ordinance of the city." That power exists only within the city itself or on public property of the city beyond its corporate limits. § 84.710.2. The court in *Rustici* noted that these sections do not authorize "either the Gladstone police or the Kansas City police to effect a warrantless arrest on September 23, 1979, in Gladstone, Missouri, based on a reasonable suspicion that the person arrested had violated a municipal ordinance." *Id.,* 673 S.W.2d at 770[23].

Rustici, then, actually stands for the proposition that a Kansas City parking warrant can be executed even if it is not in the possession of the arresting officer, as long as the officer attempts to execute the arrest based on the parking warrant within the city limits of Kansas City, Missouri.

However, as previously emphasized, this is obviously a matter of state law, which was never presented to the state courts, and never discussed or decided by any of the

courts below, including the Missouri Supreme Court. Accordingly, the argument is simply nonavailing to the petitioner in this case.

CONCLUSION

For the reasons advanced by the State of Missouri in this reply brief, as well as in its original brief and its petition for a writ of certiorari previously filed with this Court, the opinion of the Missouri Supreme Court, *en banc*, upholding the trial court's suppression of the evidence against the respondent on the ground that her arrest was "pretextual" and therefore in violation of the Fourth Amendment, should be vacated, and the case remanded to the Missouri Supreme Court with directions that the respondent's motion to suppress be overruled.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(5)

No. 85-303

IN THE

Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

—v.—

ZOI A BLAIR,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF MISSOURI, EN BANC

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MISSOURI, IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Missouri is one of the state affiliates.

The ACLU has long worked to protect the rights of criminal defendants and has filed many briefs, as counsel for a litigant or as amicus curiae, in cases requiring the interpretation of federal constitutional provisions related to criminal cases.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amici curiae.

STATEMENT OF THE CASE

The historical facts are clearly set forth in the opinions written by the Justices of the Missouri Supreme Court. In the course of investigating a suspected theft of furniture and related homicide, police officers in Kansas City found a palm print on the back of the victim's truck. Officers testified that, two months later, they received a "tip" that members of the Blair family were involved. The police located the prints of three family members in their files, but none matched the palm print found at the scene. Zola Blair's prints were not on file.

On the day after he received the "tip," Detective Lauffer took action that obtained Zola's palm prints for comparison with the print on the truck. He "believed" at the time, and the state now concedes, that the "tip" alone "was not enough evidence to support a warrant." Petition for Certiorari

at A3. Accordingly, Lauffer sought neither an arrest warrant nor a search warrant touching the theft and homicide offenses. Nevertheless, he "requested that defendant [Zola Blair] be picked up for homicide." Id. (emphasis supplied). The police "then" learned that Zola Blair "was the subject of an outstanding city warrant for a parking violation." Id. (emphasis supplied).[1]

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[1] Officer Stewart testified that he went to Zola Blair's home in response to a complaint that a car was unlawfully parked there. Then, "[u]pon checking the address," he "discovered" that one of the residents at that address, Zola Blair, was "wanted" pursuant to an outstanding parking violator warrant (stemming from a different incident a month earlier). Tr. at 41. However that may be, Stewart conceded that he knew of the homicide "pick up" order before he went to Blair's home and, indeed, that he apprehended her in response to that order:

> Q: But before you went over there, before you ever started over to 4331 Forest to arrest Zola Mae Blair you knew of a homicide pickup?
>
> A: Yes, sir, I had been informed of that earlier, but I did not verify it until the time we made the residence check there. . . .

It is the existence of this outstanding warrant, and some officers' knowledge of it, which forms the basis for the state's arguments in this case.[2]

Testimony from Officer Stewart, who, together with his partner, arrested Blair at home shortly thereafter, suggested two reasons for his action. On the one hand, according to the Missouri Supreme Court, he testified that he "arrested" Blair "for an

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> Q: Let's get something straight, Officer. Did you go over there to pick up Zola Mae Blair on a homicide pickup?
>
> A: If she was there, yes, sir.

Tr. at 42-43.

[2] Stewart did not have a physical warrant with him at the time he arrested Blair. Indeed, the "warrant" on which the state pins so much in this case apparently was never issued in documentary form. The only evidence that it existed was a computer record indicating that a municipal court judge had issued a "bench warrant" when Blair failed to appear and pay a fine for a traffic offense the previous fall.

outstanding city warrant. . . . " Id. at A5. This testimony is the apparent predicate for the state's argument that the arresting officer acted upon a basis for apprehending Blair independent of the homicide investigation then underway. That argument, in turn, accounts for the state's characterization of this case as one involving "an arrest on a valid municipal warrant" but with the "ulterior motive" to obtain evidence regarding homicide. Id. at I.

On the other hand, Stewart also testified that he went to Blair's home "to take her into custody on the homicide pickup order...." Id. at A5-A6. And evidence adduced in the state trial court showed much more in this vein. Stewart and his partner transported Blair not to the district station nearby, where persons apprehended for parking violations would normally be taken, but to the homicide unit at the police station downtown. There, they filed their report

under the "homicide charge number" and labeled their action as part of an investigation for homicide. Although the "normal procedure" in traffic offense cases was to take only a single "fingerprint" and to allow the arrestee to leave a district station after four hours, officers at the homicide unit in this case took "a complete set of defendant's palm and finger prints," detained Blair overnight, and questioned her concerning homicide. Blair was released at mid-morning the following day. Before she could leave the station, she was detained a second time and "booked" for the traffic offense. She was released on bond just over an hour later. Id. at A6.

Under state law and practice as articulated by the Missouri Supreme Court, any evidentiary "conflicts" regarding the purpose of Blair's initial arrest "were for the trial court to resolve." Id. The trial

court did resolve the conflicts within Stewart's testimony "in favor of defendant." The arrest was for homicide, not a traffic offense. Concluding that the trial court's determination was "supported in the evidence," the Missouri Supreme Court deferred to that determination. Id. It is this determination of historical fact, made initially by the trial court, on which the Missouri Supreme Court based its findings, also of historical fact, that the police "arrested defendant at her home, took her to the homicide unit, booked her on a charge of homicide, and took her palm and finger prints." Later the same day, Blair was "questioned about the homicide," and officers compared her palm print to the print obtained at the scene. Blair was detained overnight "for homicide" and released next morning. Id. at A3. (emphasis supplied).

After Blair's palm print was found to "match" the print at the scene, the police

obtained a warrant for her arrest on a charge of homicide and apprehended her yet again. During interrogation, "officers confronted her with evidence of the matching prints" and obtained a statement. Id. (emphasis supplied).

Blair later moved to suppress both the palm print obtained from her after her first arrest and her subsequent statement. When the trial court sustained that motion, the prosecution invoked a new statutory scheme in Missouri permitting an interlocutory appeal on evidentiary issues of this kind. Both the Missouri Court of Appeals and the Missouri Supreme Court sustained the trial court's judgment. This Court then granted the prosecution's petition for certiorari to review these evidentiary issues in advance of trial in the state trial court.

INTRODUCTION AND SUMMARY

This case demands that the Court come to grips with the way in which the actual purpose for which the police act in the field affects the validity of their behavior. We hope to assist the Court in developing a principled framework within which to account for police purpose in fourth amendment analysis and in situating the instant case in such a framework. We caution the Court against deciding too much too soon. Broad statements, taken out of context, may impede the establishment of satisfying doctrine in the ordinary, incremental manner. At the same time, we urge the Court to think conceptually about this recurring issue so that this case will advance the Court toward a complete, intellectually coherent body of fourth amendment law that is sensitive to the underlying values at stake.

In Part I of our argument, we borrow from the rich literature in point to explain why the actual purpose for which the police act cannot be ignored. In Part II, we develop a workable analytic framework for resolving concrete cases, and we explain the way in which reviewing courts should approach each stage of that analysis. In Part III, we position the case at bar in the larger framework. We argue that the police action in this case cannot be justified without enormous damage to the very capacity of the fourth amendment to guide and control police behavior. Familiar fourth amendment doctrine is controlling here. The Missouri courts correctly disposed of the state's arguments and should be summarily affirmed. Finally, in Part IV of our argument, we treat the state's arguments that the evidence obtained in this case in violation of the fourth amendment should nevertheless be admissible in Blair's trial pursuant to some "exception" to the fourth amendment exclusionary rule.

ARGUMENT

I. THE ACTUAL PURPOSE FOR WHICH THE POLICE ACT IN THE FIELD OFTEN CONSTITUTES AN ESSENTIAL INGREDIENT IN A JUDICIAL DETERMINATION OF THE VALIDITY OF THEIR BEHAVIOR[3]

If this Court does nothing else with this case, it should make it unmistakeably plain that the validity of police behavior often cannot be determined without reference to the actual purpose for which officers intruded upon interests protected by the fourth

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3 We draw primarily upon Burkoff, Bad Faith Searches, 57 N.Y.U.L. Rev. 79 (1982); Burkoff, The Pretext Search Doctrine: Now You See It, Now You Don't, 17 U. Mich. J.L. Ref. 523 (1984); Haddad, Pretextual Fourth Amendment Activity: Another Viewpoint, 18 U. Mich. J.L. Ref. 639 (1985); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974); W. LaFave, Search and Seizure § 1.2 (Supp. 1985).

amendment.[4] There is, to be sure, some appeal to the idea that fourth amendment analysis might be wholly "objective," in the sense that the question in every case might be whether police conduct, judged apart from the officers' actual purpose, can be justified on some theory--whether or not the officers concerned genuinely acted on that basis. Proceeding in that way, courts might avoid the evidentiary difficulties attending what Justice White once described as an "expedition into the minds of police officers." Massachusetts v. Painten, 389 U.S. 560, 565 (1968)(dissenting opinion). On examination, however, such a theory cannot be sustained.

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4 Only a dictum in Scott v. United States, 436 U.S. 128, 138 (1978), suggests that this Court has ever entertained such a notion. Cf. United States v. Villamont-Marquez, 462 U.S. 579, 584 n. 3 (1983)(referring to the dictum in Scott).

An attempt to separate the constitutionality of police behavior from the actual purpose for which the police act would put enormous pressure on the "atomistic" model, embraced since Katz v. United States, 389 U.S. 347 (1967). See Amsterdam, supra at 367. The general proposition that the fourth amendment has to do with intrusions into a defendant's sphere of privacy is sound. It is one thing, however, to hold that the fourth amendment is unconcerned with police behavior unless it touches a legitimate expectation of privacy, and quite another to hold that, assuming privacy is invaded, the fourth amendment is equally unconcerned with the reasons the police have for the intrusion. The protection the fourth amendment establishes for privacy is precisely that the police must have sufficient reason for invading the individual's sphere. If, by hypothesis, the fourth amendment is applicable in a case, then the standards of behavior that the

police must observe necessarily partake of actual police purpose. Doctrine must address itself to the police and make clear to them what basis they must have for invading protected interests.[5]

It is implicit in the Court's decisions in this context that fourth amendment

[5] This is not, of course, to suggest that officers' mistakes regarding the fourth amendment standards they must meet in the field can save an arrest or search that is not grounded in sufficient cause. An arrest that was not based upon probable cause can hardly be rendered constitutional by testimony that the officers concerned believed that probable cause existed. A rule of that kind would overlook the substantive protection guaranteed by the fourth amendment. Moreover, at the instrumental level, such a rule would only encourage deliberate ignorance. But cf. United States v. Leon, 104 S.Ct. 3405 (1984)(taking account of "reasonable" police mistakes in determining the application of the exclusionary rule). The argument we develop below begins with the assumption, deeply rooted in this Court's precedents, that an arrest without probable cause (as determined by a reviewing court) is unconstitutional and moves on to explain why officers' actual purpose can invalidate an arrest notwithstanding disingenuous arguments that the police action might have been undertaken on some other, ostensibly supportable basis.

doctrine sends signals to the police in order to channel their conduct in the direction that best respects, all things considered, the constitutional values at stake. It would be flatly inconsistent with that instrumental effort to tell the lower courts that they should neglect the way in which the police actually responded to the law and, instead, ask whether the same behavior might have been constitutionally acceptable if undertaken for some other reason. To launch the country on such a course would be to move attention to fourth amendment standards off the streets, where those standards should govern contacts between the police and citizens, and put them down again in sterile court rooms, where lawyers and judges argue over what the police may come to perceive as legal niceties of form. If the fourth amendment is to mean something to flesh and blood people in every day life, it must continue to mean something to those who genuinely count in this context--the police.

If any ostensible theory on which the police might have acted were sufficient to rescue an otherwise unconstitutional arrest or search, the structure of incentives this Court has put in place in prior cases would be demolished. Such an analysis would encourage the police to do what they wish in the field, without regard for fourth amendment standards and, indeed, when they know they lack constitutional authority to act--and then to hope that courts will accept disingenuous rationalizations later.[6] If the Court sends signals of that kind to the police, the entire body of fourth amendment law as we know it will be put at risk.

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[6] This Court rarely has indulged the bifurcation of actual purpose from constitutional validity. When it has, it has been in deference to competing, majoritarian values. E.g., United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980). In the present context, however, when personal privacy is at risk, the Court should hold executive authority to a more demanding constitutional standard.

Today, instructors at police academies across the country teach recruits that when they meet some conventional fourth amendment barrier in the course of their investigations, they must think of ways to satisfy fourth amendment doctrine--by generating probable cause, obtaining a warrant, etc. If actual purpose were to be eliminated from fourth amendment analysis, those instructors would respond accordingly. Recruits would be taught not to satisfy fourth amendment standards established for the kind of investigation underway, but to use their imaginations to identify some alternative excuse for coming into contact with the suspect and achieving their ends in the teeth of fourth amendment law--or, worse yet, to do what they will without regard to any legal basis and hope that creative prosecutors will concoct some way to rationalize their conduct on some currently-unknown theory.

Any failure to examine actual police purpose would deny, moreover, a deeper wisdom regarding human events. Query whether it is even sensible to propose that a confrontation between the police and a citizen can be adequately described without taking account of the purpose for which the police forced the encounter. To speak abstractly about the "objective" facts (what was said to a suspect, what physical restraint was applied, etc.) without reference to <u>why</u> actions were taken is to miss much of the <u>meaning</u> of the episode for the human beings involved--and, we think, the legal implications that attach. Talking about police intrusions upon privacy without noting the purpose for which the police act is rather like telling the story of King David and Uriah without mentioning Bath-Sheba.

We do not contend that the purpose for which the police invade interests protected by the fourth amendment should occupy the

field--such that the validity of police actions must begin and end with a reviewing court's search for some objectionable purpose lurking behind the scenes. We endorse the Court's practice of fashioning fourth amendment standards of general application --standards that condemn some forms of police behavior whatever officers' state of mind at the time. The point here is only that an ultimately satisfying body of fourth amendment law must take account of police purpose in an individual case when it threatens to subvert rules fashioned for the general run of cases.

There is nothing new in this. The Court has long made it plain that duplicitous police behavior is "serious misconduct" that "must meet with stern resistance by the courts." Abel v. United States, 362 U.S. 217, 226 (1960). Indeed, very recently, as he explained why the police in some cases would be unlikely to conduct an unlawful

search to discover a witness, Justice Rehnquist said that the "analysis might be different where the search was conducted...for the specific purpose of discovering potential witnesses." United States v. Ceccolini, 435 U.S. 268, 276 n. 4 (1978). Similar illustrations of concern regarding actual police purpose are easy enough to recall.[7] This repeated

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7 E.g., United States v. Lefkowitz, 285 U.S. 452, 467 (1932); Ker v. California, 374 U.S. 23, 42 (1963). The Chief Justice was careful to point out in South Dakota v. Opperman, 428 U.S. 364, 376 (1976), that the inventory search in that case had not been undertaken with "an investigatory police motive." Justice Blackmun acknowledged in Michigan v. DeFillippo, 443 U.S. 31, 40-41 (1979)(concurring opinion), that "stop-and-identify" ordinances present a danger of pretextual use but noted the absence of evidence of such use in the case at bar. And Justice Powell said in New York v. Class, 106 S.Ct. 960, 970 n* (1986) (concurring opinion), that the police may not "use VIN inspection as a pretext for searching a vehicle for contraband or weapons." In Michigan v. Clifford, 464 U.S. 287 (1984), the Court turned the validity of entering fire scenes on the basis of administrative warrants on the "object of the search" to be undertaken: If the "primary

recognition that actual purpose plays an important role in the validity of police conduct is, of course, only an instance of the Court's larger appreciation for the importance of purpose throughout criminal procedure.[8]

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object" is to determine the cause and origin of the fire, an administrative warrant will suffice, but if the "primary object" is to search for evidence of arson, then an ordinary "criminal search warrant" based upon probable cause must be obtained. Id. at 294, quoted in Burkoff, Rejoinder: Truth, Justice, and the American Way--Or Professor Haddad's 'Hard Choices,' 18 U. Mich. J.L. Ref. 695, 697-98 (1985).

8 E.g., Napue v. Illinois, 360 U.S. 264 (1959)(holding that a prosecutor's "knowing" use of perjury violates due process); Rhode Island v. Innis, 446 U.S. 291, 310 n. 7 (1980)(recognizing that the "intention" of police officers in addressing a suspect is related to whether their behavior constitutes "interrogation" within the meaning of Miranda); United States v. Henry, 447 U.S. 264 (1982)(holding that the "deliberate elicitation" of incriminating statements can

II. IN ANY FOURTH AMENDMENT CASE, THE COURT SHOULD, FIRST, DETERMINE THE FOURTH AMENDMENT STANDARDS APPLICABLE TO THE THEORY ON WHICH THE BEHAVIOR OF THE POLICE IS SOUGHT TO BE JUSTIFIED, SECOND, ASCERTAIN WHETHER THE ACTION IN THE CASE AT BAR WAS CONSISTENT WITH THOSE STANDARDS, AND, THIRD, DETERMINE WHETHER THE JUSTIFICATION PUT FORWARD BY THE STATE WAS ACTUALLY THE PRIMARY PURPOSE FOR WHICH THE POLICE ACTED

The problem with which the Court must contend arises when the police assert, or it is asserted in their behalf, that their actions were justified on one basis when, in fact, they acted for another purpose that did not independently validate their behavior. In the one case, the police themselves are duplicitous. They are aware of some ostensibly available basis for action and deliberately seize upon it to mask what they genuinely do for some other reason. In the

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violate the sixth amendment); Oregon v. Kennedy, 456 U.S. 667 (1982)(holding that a defendant who requests a mistrial has a former jeopardy objection to retrial only if the prosecutor acted with the "intent" to provoke such a motion from the defense).

other, the police are ignorant. They act as they do, in violation of the fourth amendment standards governing intrusions upon privacy for the purpose they have in mind, and it is the state's attorney who manufactures some basis for their action which, while unknown or unappreciated by the police, can be offered as after-the-fact justification.[9]

Vagrancy cases offer good illustrations. The police may suspect that a person on the street is carrying narcotics but have insufficient information to establish

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9 These two models are not mutually exclusive. In the instant case, for example, the evidence shows that Detective Lauffer, who ordered Blair's arrest for homicide, did not know at that time that an outstanding parking violator warrant offered a plausible, alternative justification for bringing her into contact with the police. The arresting officer, Stewart, testified that he was aware of the parking warrant at the time he made the arrest for homicide ordered by Lauffer. See note 1, supra. There is reason to question, then, whether use of the parking warrant as a pretext was the concoction of the police, i.e., Officer Stewart, or imaginative prosecutors forced to manufacture some theory on which to justify his behavior.

probable cause for an arrest and incidental search. They may make an arrest and search anyway; then they or the prosecution may, when called to account, insist that they acted to enforce a vagrancy ordinance.

Inventory cases may be to the same effect. The police may suspect that an automobile in their possession was used in a robbery but have insufficient information to establish probable cause to search it. Still, they may search the car; then they or the prosecution may claim they were exercising an authority to inventory the contents.

The "timed arrest" cases offer a third illustration. The police may have probable cause to arrest a suspect for burglary but insufficient information to obtain a warrant to search the suspect's apartment for the fruits. They may schedule an arrest for an occasion on which the suspect is at home and search the apartment at that time; then they

or the prosecution may contend that they searched only "incident" to the arrest.

To contend with abuses of this kind, we suggest a three-step analysis. First, a court should determine the fourth amendment standards applicable to the theory offered to justify the police behavior under challenge. Second, a court should determine whether those standards were met in the case at bar. If so, the court should determine, third, whether the theory put forward in justification was actually the primary purpose for which the police acted.

1. General Doctrine--And its Shortcomings

Everyone who has examined these problems has agreed that the first line of defense against manipulation is affirmative constitutional doctrine groomed to minimize opportunities for abuse. This Court's decision in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)

(invalidating vagrancy statutes drawn in the traditional manner), was in some measure designed to thwart attempts by police to abuse their authority to make arrests ostensibly for one offense (vagrancy) while actually pursuing an investigation of something else--without the necessary evidentiary basis.[10] Similarly, the guidelines fashioned for inventories in South Dakota v. Opperman, 428 U.S. 364 (1976), and the limits fixed for searches incident to arrest in Chimel v. California, 395 U.S. 752 (1969), were drawn with an eye on the pretext problem.

At the same time, it is hopeless to rely solely on blanket doctrinal rules. First, the opportunities for abuse are diverse and difficult, if not impossible, to master

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10 See also Delaware v. Prouse, 440 U.S. 648 (1979)(forbidding isolated stops for license checks without at least "reasonable suspicion").

doctrinally. Papachristou was strong medicine--administered (we think rightly) in an instance of extraordinary need. A complete doctrinal response to misdemeanor arrests, however, has yet to be fashioned. The Court has never explored what constitutional limits there may be on custodial arrests in cases in which the offense under investigation is, for example, a violation of traffic laws. See Gustafson v. Florida, 414 U.S. 260, 266-67 (1973)(Stewart, J., concurring). Those limits will have to be identified in future litigation. It is premature, then, to discuss pretextual reliance on the authority to make custodial arrests in parking violation cases until the Court has worked through the analysis and decided whether the fourth amendment permits such custodial arrests and whether, if so, accompanying "booking" procedures (like the taking of fingerprints) are valid.

Second, the Court's efforts to establish a doctrinal framework have often been disappointing--in a field in which opportunities for pretexts exist. The inventory cases are good illustrations. Many state courts have concluded, and we agree, that Opperman and the more recent decision in Illinois v. Lafayette, 462 U.S. 640 (1983), leave overly large gaps to be exploited by officers who choose to search automobiles and suspects for evidence of crime and say they meant only to make a list of the contents for the owners' protection.

Third, even when the Court has developed generally sound doctrine which effectively discourages pretextual use, there is continual pressure to dilute that doctrine in the name of police efficiency. Chimel fits here. We think the limits established for searches incident to arrest in that case were genuinely promising. Yet only a few years later, the Court fashioned the "bright line"

test in New York v. Belton, 453 U.S. 454 (1981), which plainly increases the opportunities that searches incident to arrest provide for pretextual police action--except, of course, to the extent the authority to make custodial arrests for traffic offenses is limited in the first instance by doctrine not yet articulated by the Court. Robbins v. California, 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting) (relating the dilution of Chimel resulting from Belton to the possibility that the Court may yet discourage pretext arrests by invalidating custodial arrests entirely in some traffic offense cases).

2. The Application of General Doctrine in Individual Cases

Once a court ascertains the doctrine governing the theory on which police behavior in a case is said to be justified, the next step is actually to apply that doctrine to

the facts of the individual case. It goes without saying, of course, that the police act unconstitutionally if they not only attempt to escape constitutional requirements that would attend forthright action (such as probable cause for a felony arrest), but also outstrip what they can constitutionally do under the rubric on which they purport to act. If, for example, there are limits on the authority of the police to make custodial arrests for traffic offenses, and if the police overreach those limits in a given instance, then there is constitutional error on that ground--and no court need look further for an ulterior objective lying behind reliance on a traffic offense arrest in the first instance.

3. Actual Police Purpose

Assuming that the police behavior under challenge in an individual case comported with the doctrine governing the theory on

which the police action is sought to be justified, a court should turn to a final analytic step. An ulterior objective in an individual case also damns police behavior as unconstitutional.

In California v. Trombetta, 104 S.Ct. 2528 (1984), for example, the Court worried at the outset over the difficulty of fashioning doctrine to govern the preservation of evidence for potential examination by the defense. After struggling with those problems, the Court concluded that the failure to preserve a sample of the defendant's breath in the case at bar was not, without more, a violation of the Constitution. This was to say, of course, that in ordinary circumstances in which the police obtain breath samples "for the limited purpose of providing raw data to the Intoxilyzer," there is no blanket constitutional rule that those samples must be preserved.

Nevertheless, the Court made it plain that the outcome in Trombetta would have been different if state authorities had destroyed the samples "in a calculated effort to circumvent the disclosure requirements established by Brady v. Maryland and its progeny." Id. at 2534. The record in Trombetta contained "no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence." Id. We think Trombetta is only a recent example of the Court's willingness to look beyond police officers' compliance with constitutional standards applicable to any ostensibly available basis for their behavior and to inquire, as well, into the actual purpose for which the police acted.

We hasten to point out that the search here need not be what Justice White feared in Painten. Rather, courts can identify purpose in light of factors routinely considered in other, similar contexts. E.g., Arlington

Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977).

Repeated instances in which the police use a justification for action to obtain material unrelated to that justification may show a clear pattern of pretextual use. This is what Justice Blackmun flagged in DeFiilippo, supra. Indeed, in that instance Justice Blackmun suggested that repeated pretextual use of a "stop-and-identify" statute would make the statute itself vulnerable.

Then, too, the historical background of a police decision to act may be probative of its purpose. If, for example, it appears that the police were engaged in an investigation of felony and, accordingly, were doing what was open to them to do in aid of amassing evidence of that offense, but then suddenly shifted to some other basis for action and, resting on that different rationale, turned up evidence of the felony,

it would be apparent that the use of the new ground for action was pretextual.

This was precisely the Court's analysis in Clifford, supra, in which officers' initial search of the premises to determine the cause of a fire was separated in time from a subsequent search which turned up evidence. The factual history of the two independent searches supported the Court's inference that the second search was not genuinely related to the officers' administrative function but, instead, part of an ongoing investigation of felony arson.

Departures from normal procedures are also probative of ulterior objectives. Variations from ordinary practices are evidence of an ulterior objective that explains why the police strayed from the course they would usually follow. If, for example, officers ordinarily assigned to homicide investigations (who would not, accordingly, be asked routinely to make

traffic offense arrests) were to make an isolated arrest on a parking warrant and turn up evidence of homicide, the inference that the arrest was pretextual would be powerful.

This was the analysis in Lafayette, supra, where Officer Mietzner testified that he inventoried items in a suspect's shoulder bag "because it was standard procedure. . . ." and flatly denied that he was seeking or expected to find evidence of crime. Id. at 642. Still, in order to ensure that the procedure used in LaFayette was "standard," Chief Justice Burger admonished the state courts on remand to determine whether the suspect "was to have been incarcerated after being booked for disturbing the peace." Id. at 648 n. 3. If not, the "inventory" of the shoulder bag could not be explained by reference to standard procedures.

Finally, testimony from witnesses, including the officers concerned, can throw light on the actual purpose for which action

was taken. In fourth amendment cases, officers typically take the stand at pre-trial hearings to describe the manner in which they obtained evidence the defense hopes to exclude. Then and there, they can simply tell the court what they were doing, or thought they were doing, in the field. Cf. Bordenkircher v. Hayes, 434 U.S. 357, 371-72 (1978)(Powell, J., dissenting) (acknowledging the evidentiary difficulties in ascertaining a prosecutor's actual purpose but relying in the instant case on candid testimony below).

While we think the Court should formulate fourth amendment doctrine that cannot easily be circumvented by police perjury, we do not assume that police officers will routinely mislead the courts in cases of this kind. Certainly, we think that after working a case through the analytic steps identified above (as the Missouri Supreme Court did in this case) a court should take this last,

potentially telling step of asking police officers for the simple truth.

The counters to this analysis are reducible to two concerns. First, there is the worry, voiced already by Justice White, that in going beyond an attempt to discourage pretextual behavior in the formulation of ordinary doctrine and attempting to locate ulterior objectives in individual cases, the courts will be drawn into a search for subjective states of mind. We think, however, that what we have said about inquiries into actual purpose diffuses that concern. We do not urge the Court to instruct trial judges to dig into the psychic make-up of police officers; we only mean that the actual purpose for which the police act be investigated and taken into account after it is decided that there is some ostensible justification for their behavior. Cf. Oregon v. Kennedy, supra at 675 (opinion of Rehnquist, J.) (explaining that even "a

standard that examines the intent" of prosecutors is "manageable" inasmuch as it merely calls for drawing inferences from objective facts and circumstances--"a familiar process in our criminal justice system").

Nor do we suppose that human beings have only one reason for behaving as they do; officers may well have multiple objectives. We do not argue that an officer's mere knowledge that action taken on one basis may turn up evidence relating to something else should, without more, condemn that officer's behavior as invalid under the fourth amendment. The state in this case attacks a straw man when it contends that the argument we have made would "immunize" from arrest anyone named in a traffic warrant who is also suspected of some other offense. An officer's knowledge of another investigation, even a hope that evidence useful for some other purpose will be turned up, will not

condemn a genuine traffic arrest. If, however, the primary purpose for which the police act is not to execute a traffic warrant in the routine way for the enforcement of the traffic laws, but, instead, to obtain evidence in connection with some other investigation, then a constitutional violation should be found. As a common sense short-hand, we suggest the courts determine whether, but for the objective to obtain evidence of another crime, the police would have made the traffic offense arrest.

Second, there is the inescapable truth that an analysis which attaches significance to police purpose will mean that more convictions will be overturned on the ground that evidence was seized in violation of the fourth amendment. We urge the Court not to reject the analysis we have outlined because it may generate applications of the exclusionary rule. For in these cases police

behavior would be disapproved in precisely the situations in which there is deterrent value--cases in which the police by hypothesis know they are not entitled to seek evidence forthrightly (for want of probable cause or some other fourth amendment requirement) and seek to circumvent those requirements by resorting to some other, pretextual rationale for their behavior.

III. THE ARREST IN THIS CASE WAS MADE PURSUANT TO AN INVALID "PICKUP" ORDER FOR HOMICIDE AND CANNOT BE RESCUED BY SUBSEQUENT PROOF THAT BLAIR MIGHT HAVE BEEN APPREHENDED ON A TRAFFIC WARRANT

While there was some testimony at the hearing on Blair's motion to suppress to the effect that Officer Stewart might have arrested Blair on the authority of the traffic warrant, the Missouri Supreme Court properly sustained the trial court's determination that, as a matter of historical fact, the arrest was made in response to the "pickup order" issued by Detective Lauffer in

connection with the homicide investigation. Since it is undisputed that the police lacked probable cause to detain Blair for homicide, her arrest and detention for that purpose was in violation of the fourth and fourteenth amendments, and evidence obtained by exploitation of the unlawful arrest (the palm print and the statement) was inadmissible.[11] The Missouri state courts so held at all three levels of the state court system. There being no reason to second-guess either the state courts' findings of historical fact or their application of well-settled fourth amendment

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11 Detective Lauffer testified that he "believed that there was not enough evidence to support a warrant;" the Supreme Court of Missouri stated flatly that it was "undisputed that the police lacked probable cause to arrest defendant on the homicide charge." The record thus suggests no occasion to look behind the judgment of all participants and courts below for an argument that the Kansas City police might have had probable cause for an arrest and failed to recognize it.

doctrine, this Court should now affirm.[12]

The Missouri Supreme Court's judgment can be reversed only if the prosecution can preserve evidence obtained in a blatantly unconstitutional way by rewriting history.

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12 When, in constitutional cases, state courts determine questions of historical fact in favor of the individual, those findings should be accepted here on direct review. Fed. R. App. P. 52(b). Law enforcement interests in Missouri can safely be left to that state's highest court. In this particular case, there are even more reasons for deference on factual matters. The proceedings below have all been at the pre-trial stage, when the State of Missouri has substantial interests in expeditious adjudication of threshold evidentiary matters. To ensure that interlocutory appeals such as occurred in this case do not delay or otherwise frustrate criminal trials, the Missouri Supreme Court itself defers to trial court determinations of fact supported by the evidence. Any attempt by this Court to second-guess judgments of this kind would threaten the Missouri Supreme Court's ability to orchestrate interlocutory appeals within the state system in the manner that court sees fit. A decision to overturn state findings of fact, moreover, would only lengthen pre-trial process that has already consumed three years in this case. Simply put, it is now time that this case be returned to the state trial court so that Zola Blair can finally stand trial for the offenses of which she is charged.

Since there was an outstanding warrant for Blair's apprehension for a traffic violation, the prosecution proposes that the arrest actually made was an arrest on the traffic charge, albeit for the purpose of obtaining evidence of the homicide offense. This will not do.

The record shows that Detective Lauffer was not even aware of the traffic warrant when he issued the critical order to apprehend Zola Blair for homicide. The arresting officers learned of that warrant only later, and incidentally. In any case, they went to Blair's home to take her into custody for homicide. The state courts so found. The prosecution's argument boils down to the contention that the mere existence of another basis for police action somehow insulates what was, in fact, a deliberate violation of the fourth amendment.

Even if, for purposes of argument, the Court were to indulge the prosecution's bad

history and were to treat this case as one in which the police contemporaneously put forward one basis for their behavior (the traffic warrant), but actually acted to obtain evidence of homicide (an ulterior objective), the state courts must be affirmed.

The record in this case is inadequate to permit the Court to undertake the initial step of its analysis--an exploration of what limits there may be on the authority of police officers to make custodial arrests for traffic violations and to put persons so arrested through "booking" routines such as fingerprinting. In arguing that the existence of the traffic warrant somehow rescues the arrest in this case from invalidity, the state assumes something this Court has never firmly decided, something that must be fully explored and decided before the Court can reach the question whether, given a valid justification for coming into contact with Blair, the police

action under attack here can be sustained notwithstanding an ulterior objective.

Even if it is assumed that the police in this case arrested Blair for the traffic offense, and it is assumed that such an arrest might have been constitutional, the Court still should find a violation of the fourth amendment since the police plainly acted for the primary purpose of obtaining evidence of homicide.

The sequence of events leading up to the arrest demonstrates that the primary objective was to obtain Blair's palm print in order to compare it to the print found at the scene of the homicide. The record reveals an uninterupted line between initial suspicions of the Blair family and the police action to obtain evidence linking Zola Blair to the homicide. The traffic warrant was at best only incidental to the real story of this case.

The dramatic departures from ordinary procedures in traffic cases also show that the arrest was really for homicide. The Missouri Supreme Court was careful to make this clear. The record shows that when Kansas City officers make arrests for traffic violations, they routinely take arrestees to district stations and obtain "one fingerprint" for identification purposes--allowing persons arrested to leave after posting bond a few hours later. In this instance, in contrast, Officer Stewart took Blair to the homicide unit, booked her for homicide, and took her palm prints. Thereafter, she was interrogated concerning the homicide and held overnight on that charge. She was booked on the traffic violation only after being released and retaken the following day.[13]

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13 A comment in the state's brief seems to concede that the arresting officers in this case were not "normally" assigned to "serve" traffic warrants. Petitioner's Brief at 40.

Finally, the frank testimony from the officers involved demonstrates beyond question that the police behavior here was for the purpose of obtaining evidence of homicide. The state courts acknowledged the internal inconsistency in that testimony and resolved the conflict in Blair's favor. The state courts believed Detective Lauffer when he said he did not think at the time that he had probable cause to order Blair's arrest but issued the "pick up" order anyway, and they believed Officer Stewart when he said he went over to Blair's house to arrest her on the basis of that "pick up" order. See note 1, supra.

Indeed, the evidence that the police apprehended Blair primarily for homicide is so overwhelming that we wonder whether this case might better be analyzed as one in which imaginative prosecutors, not the police, have attempted to manufacture a plausible theory on which to rationalize police action after the fact.

IV. NO EXCEPTION TO THE RULE OF EXCLUSION WILL JUSTIFY THE USE OF THE EVIDENCE UNLAWFULLY OBTAINED IN THIS CASE AT BLAIR'S TRIAL IN STATE COURT

The evidence obtained in this case cannot be preserved for trial under any of the "exceptions" to the exclusionary rule proffered by the state. This case is not here as a vehicle for elaborating the fruit-of-the-poisonous-tree doctrine, the newly-announced "good faith" exception in search warrant cases, or the so-called "inevitable discovery" doctrine. To hold at this late date, and on this meager record, that evidence obtained in violation of the fourth amendment can nonetheless be admitted would undercut the significance of the Court's ruling on the question certiorari was granted to treat. In any event, the state has failed to lay a foundation for any of these arguments.

The causal linkage between the unlawful arrest of Blair and the seizure of evidence

was hardly attenuated. The palm print was the immediate product of the arrest, and that print, in turn, was exploited to obtain the statement a few days later. Indeed, Blair made that statement only after the police presented her with the "match" they had made between her print and the print found at the scene. Hayes v. Florida, 105 S. Ct. 1643 (1985); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 442 U.S. 590 (1975).

The argument that the police "reasonably relied" on the traffic warrant is belied by the facts. Detective Lauffer authorized an arrest for homicide when he knew he had no basis for it, and Officer Stewart carried out that order. Even if the facts found by the state courts are ignored and it is assumed for purposes of argument that Stewart apprehended Blair for a traffic violation, the immediate departure from ordinary procedures robbed the police of any serious

claim of "reasonable reliance" on the authority of the traffic warrant. United States v. Leon, 104 S.Ct. 3405 (1984), has nothing to do with this case.

Finally, the prosecution has demonstrated no hypothetical independent source for the palm print or the statement. On the contrary, if the police had employed their standard routine for traffic violation cases, they would have obtained neither. No other investigation, ongoing or available, has been identified. Nix v. Williams, 104 S. Ct. 2501, 2509-12 (1984).[14]

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14 At first glance, there appears to be some similarity between the state's primary argument, that the actual purpose for which the police acted is immaterial to the validity of their behavior under the fourth amendment, and this further argument that the palm print and statement would have been obtained anyway. The theoretical nature of these two arguments should, however, be clear. To the extent the state contends that the arrest of Blair for homicide can be validated by proof that she might have been arrested on a traffic warrant, the state argues that the fourth amendment was not violated at all. To the extent the state contends that the palm print and statement

CONCLUSION

For the reasons given above, we urge the Court to affirm the judgment of the Missouri Supreme Court. The record does not show what other evidence the prosecution may have to connect Zola Blair to the homicide of which she is charged. In any event, it is now time to return this matter to the state trial court for further proceedings based on evidence obtained in a constitutionally valid manner.

Respectfully submitted,

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would "inevitably" have been obtained, the state assumes (for purposes of this argument) that a substantive violation of the fourth amendment occurred but argues that the ordinary rule of exclusion should not be applied as a sanction. We note that this Court's rejection of the state's argument regarding the substantive meaning of the fourth amendment would not affect the availability of the "inevitable discovery" argument in an appropriate case.